80-1710

No.

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In The

Supreme Court of the United States

October Term, 1980

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

vs.

CONDE J. PEOPLES, III, PHILIP S. GOSS, and MARY SWEAT,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

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QUESTIONS PRESENTED

1. Since this Court has not extended the right of privacy so as to protect sexual conduct between unmarried persons, New York State's consensual sodomy statute, Penal Law §130.38, is not unconstitutional as an invasion of the right to privacy.

2. Where the sodomous conduct committed by respondents occurred in vehicles parked along public thoroughfares, respondents do not have standing to assert a violation of the right to privacy.

3. Where the distinction between married and unmarried persons recognized by Penal Law §130.38 has a rational basis, §130.38 is not violative of the equal protection under law guaranteed by the United States Constitution.

4. Even if the right to privacy does protect acts of consensual sodomy between unmarried persons, it would logically only protect acts committed privately, and therefore, Penal Law §130.38 should not be found unconstitutional with respect to sodomous acts committed in public places.

LIST OF PARTIES

The People of the State of New York
Edward C. Cosgrove
District Attorney, Erie County

Petitioner

Conde J. Peoples, III
Philip S. Goss
Mary Sweat

Respondents

The People of the State of New York
Richard A. Hennessy, Jr.
District Attorney, Onondaga County*

Ronald Onofre*

Defendant

*All of the cases were consolidated for appeal to the New York Court of Appeals.

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PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

OPINION BELOW

Respondents Peoples and Goss were convicted following a jury trial in Buffalo City Court on March 14, 1979. Respondent Sweat was convicted following a non-jury trial in Buffalo City Court on April 30, 1979. The convictions of all three were affirmed by the Hon. Penny M. Wolfgang, Erie County Court Judge, on October 9, 1979. (Order and Memorandum opinion attached at Appendix B.) The New York Court of Appeals vacated the convictions of all three respondents and dismissed the informations against them on December 18, 1980. (Order and opinion attached at Appendix A. Opinion at 51 NY2d 476.)

JURISDICTION OF THIS COURT

On December 18, 1980, the New York State Court of Appeals held New York Penal Law §130.38 to be repugnant to the Constitution of the United States, thereby reversing the judgment of the Erie County Court with respect to respondents Peoples, Goss and Sweat. On February 10, 1981, respondents' petition for a rehearing to the Court of Appeals was denied. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

This petition raises issues involving the Fourteenth Amendment to the United States Constitution, and the constitutionally protected right to privacy. (See Appendix C for text.)

STATEMENT OF THE CASE

Defendants Peoples and Goss were both charged, by Criminal Informations, on November 23, 1978, with consensual sodomy in violation of New York State Penal Law §130.38.

On November 23, 1978, at approximately 6:30 a.m., two Buffalo Police Officers were patrolling in a car in the vicinity of Front Park, in the City of Buffalo (R258).* The two officers, Patrolman Schmitz and Patrolman Diamond, observed an automobile parked at the side of the road, on D.A.R. Drive in the park (R261, R275). The officers pulled up to the car; Patrolman Schmitz exited the patrol car to investigate (R261, R276).

Upon approaching the car, Patrolman Schmitz observed the defendants, Peoples and Goss, engaged in an act of oral sodomy (R263). Immediately thereafter, Patrolman Diamond approached the car and saw Mr. Peoples' head rise from the area of Mr. Goss'

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*Numerals in parentheses refer to the pages of the stenographic transcript of the trials contained in the Records on Appeal to the New York Court of Appeals.

lap (R277). Both men were placed in custody and taken to Central Booking at Police Headquarters (R280, R266).

The defendants testified on their own behalf. Both denied engaging in oral sodomy (R55, R67). They stated that they were masturbating each other at the time that the police arrived (R55, R67).

After a jury trial, both defendants were found guilty of consensual sodomy. Defendant Goss was sentenced to pay a $100 fine and Defendant Peoples was sentenced to pay a $200 fine.

Defendant Mary Sweat, and a co-defendant were charged on January 14, 1979, by a Criminal Information, with consensual sodomy in violation of New York Penal Law §130.38.

On January 14, 1979, at approximately 1:50 a.m., at the intersection of Chippewa and Franklin Streets in Buffalo, Mary Sweat was seen by police entering a Ford pickup truck. The pickup truck was followed to No. 40 Irving Place where it pulled over to the curb and parked (R244). The street lighting in the residential area was adequate to provide the police, who looked through the truck's windows, the opportunity to observe Mary Sweat performing an act of oral sodomy upon a male companion in the truck (R244, R250, R252).

Mary Sweat took the witness stand and denied the act of sodomy, but admitted to touching the male's penis with her hand (R257).

After a non-jury trial, Sweat was found guilty of consensual sodomy, and sentenced to a conditional discharge.

Prior to the commencement of the trials of respondents Peoples and Goss, and Mary Sweat, motions were made by their counsel seeking dismissal of the charges on the grounds that the statute in question was unconstitutional in that it denied respondents their rights to privacy and equal protection of the laws under the United States Constitution. (Peoples and Goss,

R45-50; Sweat R40-50). The respective trial courts denied respondents' motions. (Peoples and Goss, R67; Sweat R129-133). In an order dated October 9, 1979, Erie County Court Judge, Hon. Penny M. Wolfgang, affirmed in all respects the convictions of all three defendants (See Appendix B for memorandum decision).

The cases of *People v. Sweat* and *People v. Peoples and Goss* were consolidated for appeal to the New York Court of Appeals, along with the case of *People v. Onofre*, 72 NY2d 268 (4th Dept. 1980), which presented the same issues of law. Among the points raised by defendants were that the sodomous acts were protected by their constitutional right to privacy, and that Penal Law §130.38 was unconstitutional as violative of the Equal Protection Clause of the Fourteenth Amendment. On December 18, 1980, the New York Court of Appeals reversed the convictions of Peoples, Goss and Sweat, holding that Penal Law §130.38 was repugnant to the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. (See, Appendix A for the opinion of the Court of Appeals.)

REASONS FOR GRANTING CERTIORARI

The constitutionally recognized right to privacy does not protect acts of consensual sodomy committed by individuals in automobiles parked on public streets.

Although it is not conceded that the respondents have standing to assert a constitutional right to privacy in the context of the present case, it is submitted that Penal Law Section 130.38 is not violative of such a right.

This Court, in *Griswold v. Connecticut*, 381 US 479, recognized a right to privacy attendant to the marital relationship. Mr. Justice Douglas, speaking for the majority stated:

> The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. (381 US, at p. 485).

and

> We deal with a right to privacy older than the Bill of Rights, — older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faith, a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions. (381 US, at p. 486).

As to the role of the Court in its inquiry, Mr. Justice Douglas stated:

> We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions. This law, however, operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relationship. (381 US, at p. 482).

The recognition, in *Griswold*, of a specific right to privacy within marriage, has particular significance to the present case since the parties to the sodomous conduct herein were not married to each other.

Mr. Justice Goldberg, in his concurring opinion in *Griswold*, adopted Mr. Justice Harlan's dissenting statement in *Poe v. Ullman*, 367 US 497, which first sought a recognition of the right to privacy enjoyed by married couples.[1] Of great importance to the instant matter, Mr. Justice Harlan recognized in *Poe* that:

> Yet the very inclusion of the category of morality among state concerns indicates that society is not limited in its objects only to the physical well-being of the community, but has traditionally concerned itself with

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[1] "I believe that a statute making it a criminal offense for *married couples* to use contraceptives is an intolerable and unjustifiable invasion of privacy in the conduct of an individual's personal life." J. Harlan, *Poe v. Ullman*, 367 US, at p. 539, (emphasis in the original).

> the moral soundness of its people as well. Indeed, to attempt a line between public behavior and that which is purely consensual or solitary would be to withdraw from community concern a range of subjects which every society in civilized times has found it necessary to deal. The laws regarding marriage which provide both when the sexual powers may be used and the legal and societal context in which children are born and brought up, as well as forbidding adultery, fornication, and homosexual practices which express the negative of the proposition, confining sexuality to lawful marriage, form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must be built upon that basis. (367 US, at pp. 545-546).

Mr. Justice Harlan went on to state:

> The right to privacy most manifestly is not an absolute. Thus, I would not suggest that adultery, homosexuality, fornication and incest are immune from criminal enquiry, however privately practiced. So much has been explicitly recognized in acknowledging for State's rightful concern for its people's moral welfare. (367 US, at pp. 552-553).

In *Griswold,* Mr. Justice Goldberg stated:

> Finally, it should be said of the court's holding today that it in no way interferes with a State's proper regulation of sexual promiscuity or misconduct. (381 US, at pp. 498-499).

and went on to quote from Mr. Justice Harlan's statement in *Poe, supra:*

> Adultery, homosexuality and the like are sexual intimacies which the state forbids . . . but the intimacy of husband and wife in necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected. It is one thing when the State exerts its power either to forbid extra-marital sexuality . . . or to say who may marry, but

> it is quite another when, having acknowledged a marriage and the intimacies inherent in it, it undertakes to regulate by means of the criminal law the details of that intimacy. (381 US, at p. 499)

Clearly, then, the right to privacy, vis-a-vis total sexuality, has been limited by this Court to the marital relationship and cannot be claimed by the respondents in the instant case. Enjoying no right to privacy in their sodomous relationship, no right of these respondents has been abridged.

Respondents however, place emphasis on the holding in *Stanley v. Georgia*, 394 US 557, as extending the "right to privacy." It is respectfully submitted that a strict reading of that decision does not warrant such an inference. This matter was discussed by this court in the following context:

> It is now well established that the Constitution protects the right to receive information and ideas [citations omitted]. This right to receive information and ideas, regardless of their social worth [citations omitted] is fundamental to our free society. Moreover, in the context of the case — a prosecution for mere possession of printed or filmed matter in the privacy of a person's own home — that right takes on an added dimension. For also fundamental is the right to be free, except in very limited circumstances, from unwarranted governmental intrusions into one's privacy. (34 US, at p. 564).

and

> But we think that mere categorization of these films as "obscene" is insufficient justification for such a drastic invasion of personal liberties guaranteed by the First and Fourteenth Amendments. Whatever statutes regulating obscenity, we do not think they reach into the privacy of one's own home. If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds. (394 US, at p. 565).

In contradistinction to respondents' claim that the holding in *Stanley*, "involved, purely and simply, a person's satisfaction of his mental and emotional needs of a sexual nature" (Appellant's Brief to the Court of Appeals at page 8), the Court, in *Stanley* stated:

> We hold that the First and Fourteenth Amendments prohibit making mere possession of obscene material a crime. *Roth* and the cases following that decision are not impaired by today's holding. As we have said, the United States retain broad power to regulate obscenity; that power does not extend to mere possession by the individual in the privacy of his own home. (394 US, at p. 568).

It appears, then, that this Court, in *Stanley*, did not extend the right of privacy from the marital relationship into the realm of the absolute but determined the issue before it on the basis of the First Amendment's and the Fourteenth Amendment's protection of ideas and thought.

This area of constitutional law was again addressed in *Eisenstadt v. Baird*, 405 US 438, which overturned two Massachusetts statutes dealing with the distribution and proscription of contraceptives as not even being rationally related to a valid state purpose.

> Of course, if we were to conclude that the Massachusetts statute impinges upon fundamental freedoms under *Griswold*, the statutory classification would have to be not merely *rationally related* to a valid public purpose but *necessary* to the achievement of a *compelling* state interest. *E.g. Shapiro v. Thompson*, 394 US 618; *Loving v. Virginia*, 388 US 1. But just as in *Reed v. Reed*, 404 US 71, we do not have to address the statute's validity under that test because the law fails to satisfy even the more lenient equal protection standard. (405 US, at 447 n. 7, emphasis in original).

This Court, in *Eisenstadt*, could not find a rational basis for the different treatment accorded married and unmarried persons

under the Massachusetts statutes. However, the Court did not invalidate the distinction between married and unmarried persons;[2] it accepted such a distinction:

> Conceding that the State could, consistently with the Equal Protection Clause, regard the problems of extramarital and premarital sexual relations as "[e]vils . . . of different dimensions and proportions, requiring different remedies" . . . we cannot agree that the deterrence of premarital sex may reasonably be regarded as the purpose of the Massachusetts law. (405 US, at p. 448).

The Court based this conclusion on the widespread availability, to unmarried persons, of devices for the prevention of disease, as well as other grounds. Likewise, the Court could find no rational basis to sustain the statutes as effecting matters of health, especially in light of the federal and state laws regulating the distribution of harmful drugs.

The Court, in *Eisenstadt*, then went on to put this question:

> If the Massachusetts statute cannot be upheld as a deterrent to fornication or as a health measure, may it nevertheless, be sustained simply as a prohibition contraception? (405 US, at p. 452).

Recognizing that *Griswold* was not determinative of whether a State could ban the distribution of contraceptives,[3] the Court stated:

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[2]As Mr. Justice White noted in his concurring opinion, "The State did not purport to charge or convict Baird for distributing to an unmarried person. No proof was offered as to the marital status of the recipient." 405 US, at 462; and "That Baird could not be convicted for distributing Emko to a married person disposes of this case. Assuming, *arguendo*, that the result would be otherwise had the recipient been unmarried, nothing has been placed in the record to indicate her marital status." 405 US, at 464.

[3]See also Mr. Justice White's concurring opinion in *Eisenstadt*, 405 US, at 461: "As there [in *Griswold*] applied, the Connecticut law, which forbade using contraceptives or giving advice on the subject, unduly invaded the zone of marital privacy protected by the Bill of Rights. The Connecticut Law did not regulate the manufacture and sale of such products and we expressly left open any question concerning the permissible scope of such legislation."

> . . . if Griswold, is no bar to a prohibition of contraceptives, the State could not consistently with the Equal Protection Clause, outlaw distribution to unmarried but not to married persons. In each case the evil, as perceived by the State, would be identical, and the under-inclusion would be invidious. (405 US, at p. 454).

It is seen, therefore, that regardless of the impact of *Griswold*, the evil sought to be prevented by the State's regulation of contraceptives would be the same for married persons as well as unmarried persons. For that reason the distinction in the Massachusetts statute between married and unmarried persons lacked any rational basis which could possibly further a legitimate state purpose or interest in the regulation of contraceptives.

Although *Eisenstadt* did not resolve the question of whether or not the distribution of contraceptives could be prohibited to married persons, under *Griswold*, it did state:

> If the right to privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child. (405 US 453).

The Court, thus, perceived a protected area in matters affecting procreation,[4] which was more fully developed in *Roe v. Wade*, 410 US 113. This Court did not extend the unqualified right to marital privacy to unmarried persons.

The right of privacy was once again treated at length in *Roe v. Wade, supra*. In that decision this Court stated:

> The Constitution does not explicitly mention any right of privacy. In a line of decisions, however going back perhaps as far as *Union Pacific R. Co. v. Botsford*,

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[4]Compare *Skinner v. Oklahoma*, 316 US 535, at page 541. "We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race."

> [citations omitted] the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. . . . These decisions make it clear that only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty," *Palko v. Connecticut*, 302 US 319, 325, are included in this guarantee of privacy. They also make it clear that the right has some extension to activities relating to marriage [citation omitted]; procreation, [citation omitted]; family relationships, [citations omitted]; and child rearing and education [citation omitted]. (410 US, at pp. 152-153).

The Supreme Court has never extended the "right to privacy" to include deviate sexual behavior or all forms of consensual sexual activity.

As to the extent of the right, the Court stated:

> The privacy right involved, therefore, cannot be said to be absolute. In fact, it is not clear to us that the claim asserted by some *amici* that one has an unlimited right to do with one's body as one pleases bear a close relationship to the right of privacy previously articulated in the Court's decisions. The Court has refused to recognize an unlimited right of this kind in the past. (410 US, at p. 154).

It is upon this decisional background that respondents argued that New York State Penal Law 130.38 is violative of the constitutional right of privacy. But, this very question was directly presented in *Doe v. Commonwealth's Attorney for City of Richmond*, 403 F. Supp. 1199 (E.D. Va. 1975) aff'd 425 US 901 (1976). In that case, the identical argument made by respondents here, was rejected. In determining the constitutionality of Virginia's statute making sodomy a crime, a Three Judge District Court stated:

> No judgment is made upon the wisdom or policy of the statute. It is simply that we cannot say that the statute offends the Bill of Rights or any other of the Amend-

> ments and the wisdom or policy is a matter of the State's resolve. (403 F. Supp., at p. 1200).
>
> If the State determines that punishment, therefore, even when committed in the home, is appropriate in the promotion of morality and decency, it is not for the Courts to say that the State is not free to do so. (403 F. Supp., at p. 1202).

This Court's affirmance of the Virginia Court in *Doe*, no matter what else, did make it clear that there was no concern of the Supreme Court to extend the right of privacy to all sodomous relations. Therefore, the decision of the New York Court of Appeals is at odds with the previous decisions of this Court, and should be reviewed.

In summary, it is respectfully submitted that, contrary to the Court of Appeals decision herein, sodomy is not encompassed by any recognized right to privacy, and that the State may properly proscribe such conduct, as well as adultery, fornication and incest, and determine such matters as the age of consent. As Mr. Justice Harlan in *Poe, supra*, 367 US, at 539 stated:

> In reviewing state legislation, whether considered to be in the exercise of the State's police powers or in provision for the health, safety, morals or welfare of its people, it is clear that what is concerned are, "the powers of government inherent in every sovereignty." *The License Cases*, 5 How. 504, 583. Only to the extent that the Constitution so requires may this Court interfere with the exercise of this plenary power of government.

The Constitution only requires that the State abstain from regulating activity within the marital bedroom in deference to the recognized right to marital privacy. The Constitution does not require that the State be divested of its authority to proscribe deviate sexual behavior between unmarried persons.

Therefore, the decision by the New York Court of Appeals herein must be reviewed by this Court since it appears to be contrary to previous holdings by this Court.

Penal Law Section 130.38 is not violative of the right to equal protection of the law.

Respondents allege that the consensual sodomy statute, Penal Law Section 130.38, is violative of equal protection, in that it proscribes certain conduct only between unmarried persons and does not attempt to render criminal the same conduct between married persons.

It is the position of the Petitioner that the sodomy statute is a valid exercise of the State's power which does not create any illegitimate classification and is, therefore, consistent with the equal protection under the law guaranteed by the Constitution.

As noted above, any attempt by the State to proscribe sexuality within the marital relationship would constitute an unwarrantable invasion of the right to marital privacy, recognized in *Griswold v. Connecticut, supra.* However, because a statute recognizes certain protected areas, or persons, it does not follow that it cannot proscribe conduct falling outside those protected areas.

As was stated by the Appellate Term of the Second Department of the New York Supreme Court in *People v. Rice,* 87 M2d 257, at page 258:

> States have always had the power to regulate sexual conduct in order to promote the health, safety and morals of their inhabitants, and while the statute in question could have prohibited consensual sodomy in its entirety, it merely included within the definition of "deviate sexual intercourse" the exception which would have been required in any case under the decision in *Griswold v. Connecticut,* (381 US 479)... The only exception to the New York statute has been mandated by the *Griswold* decision based on the privacy attached to the marital relationship. Without this requisite base, to wit: marriage, there can be no exception under the rationale of *Griswold.*

The fact that the institution of marriage encompasses various recognized rights does not preclude the State from regulating activity outside that institution.

It is seen, therefore, that the statute's proscription of consensual sodomy is an exercise of the State's authority "to regulate sexual conduct in order to promote the health, safety and morals" of its inhabitants. In the instant case, the distinction between married and unmarried persons is required by the rights accorded married persons. The statute recognizes that distinction; it does not, in and of itself, create it.

The validity of the distinction between proscribing consensual sodomy between unmarried persons and not proscribing such activity between married persons has been previously noted. In *Raphael v. Hogan*, 305 Fed. Supp. 749, the Court stated:

> The authority of the State to enact laws "to promote the health, safety, morals and general welfare of its people" cannot be doubted. *Near v. Minnesota*, 283 US 697 (at page 754).

and

> We believe a rational foundation exists for the state's discrimination between acts of consensual sodomy committed by married and unmarried persons. (at page 756).

It is urged that the distinction between married and unmarried persons under Penal Law Section 130.38 has a rational basis and is not, in any sense, violative of the constitutional right to equal protection. (*Matter of Levy*, 38 NY2d 653). Therefore, this Court is respectfully requested to review the contrary holding of the New York Court of Appeals in this case.

Even if Penal Law §130.38 is found unconstitutional with respect to private conduct, the statute should be held to be valid with respect to sodomous acts performed in public areas.

It was further contended by the respondents that §130.38 should be stricken in its entirety. However, if the right to *privacy* prevents prosecution for consensual sodomy as asserted by respondents, then logic would compel that the statute only be found unconstitutional as applied to *private* activity. (See *People v. Onofre*, 72 AD2d 268 (4th Dept. 1980).) For it could not be seriously contended that any right to privacy under the law would protect sodomous conduct performed in public places.

Further, there would be no difficulty in applying the prohibition of consensual sodomy to only sodomous acts committed in a "public place." The term "public place" is already clearly and concisely defined in Penal Law Section 240.00 subd. 1 as;

> . . . a place to which the public or a substantial group of persons has access, and includes, but is not limited to, highways, transportation facilities, schools, places of amusement, parks, playgrounds, and hallways, lobbies and other portions of apartment houses and hotels not constituting rooms or apartments designed for actual residence.

There would be no difficulty in similarly construing "public place" under the consensual sodomy law.

In the instant case, both acts of sodomy were committed in areas where the public had access. Each respondent could be observed through the windows of the vehicles in which they sat.

It is indeed, tenuous to suggest that the respondents herein had a right to privacy with respect to the general public. It would seem, to the contrary, that if any right existed under the circumstances it would have belonged to the public at large to be free from having to observe acts of sodomy taking place on city streets.

Accordingly, the respondents should not now be allowed to assert a right of privacy when by committing sodomy on a public thoroughfare, they have totally failed to fashion the attendant circumstances so as to even minimally prevent inspection of their conduct by the general citizenry.

As is demonstrated by all of the preceding arguments, the New York Court of Appeals has rendered a decision on an important constitutional issue which seems to be at odds with precedent set by this Court. Therefore, it is necessary for this Court to undertake a review of the holding of the New York Court of Appeals in the instant case.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court grant the within petition.

Respectfully submitted,

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Appendices

APPENDIX A
Order and Opinion of the New York Court of Appeals Entered December 18, 1980

Remittitur

COURT OF APPEALS
STATE OF NEW YORK

The Hon. Lawrence H. Cooke, Chief Judge, Presiding

CoCt No. 483
The People &c.,

Respondent,

v.

Conde J. Peoples, III, and
Philip S. Goss,

Appellants.

The appellant(s) in the above entitled appeal appeared by Hodgson, Russ, Andrews, Woods & Goodyear; *the respondent appeared by* Edward C. Cosgrove, District Attorney, Erie County.

The Court, after due deliberation, orders and adjudges that the order is reversed, convictions vacated and informations dismissed. Opinion by Jones, J. All concur, Jasen, J., in result in a separate opinion; except Gabrielli, J., who dissents and votes to affirm in an opinion in which Cooke, Ch.J., concurs.

The Court further orders that the papers required to be filed and this record of the proceedings of this Court be remitted to the City Court, City of Buffalo, *there to be proceeded upon according to law.*

I certify that the preceding contains a correct record of the

APPENDIX A
Order and Opinion of the New York Court of Appeals
Entered December 18, 1980

proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

/s/ JOSEPH W. BELLACOSA
Joseph W. Bellacosa, Clerk of the Court

Court of Appeals, Clerk's Office, Albany, December 18, 1980.

Remittitur

COURT OF APPEALS
STATE OF NEW YORK

The Hon. Lawrence H. Cooke, Chief Judge, Presiding

CoCt No. 484
The People &c.,

Respondent,

v.

Mary Sweat,

Appellant.

The appellant in the above entitled appeal appeared by Hodgson, Russ, Andrews, Woods & Goodyear; *the respondent appeared by* Edward C. Cosgrove, District Attorney Erie County.

The Court, after due deliberation, orders and adjudges that the order is reversed conviction vacated and information dismissed. Opinion by Jones, J. All concur, Jasen, J., in result in a separate opinion; except Gabrielli, J., who dissents and votes to affirm in an opinion in which Cooke, Ch.J concurs.

APPENDIX A
Order and Opinion of the New York Court of Appeals
Entered December 18, 1980

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the City Court, City of Buffalo, *there to be proceeded upon according to law.*

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

/s/ JOSEPH W. BELLACOSA
Joseph W. Bellacosa, Clerk of the Court

Court of Appeals, Clerk's Office, Albany, December 18, 1980.

THE PEOPLE OF THE STATE OF NEW YORK, Appellant, v RONALD ONOFRE, Respondent.
THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v CONDE J. PEOPLES, III, and PHILIP S. GOSS, Appellants.
THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v MARY SWEAT, Appellant.

Argued October 8, 1980; decided December 18, 1980

SUMMARY

APPEAL, in the first above-entitled action, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department, entered January 24, 1980, which (1) reversed, on the law, a judgment of the Onondaga County Court (ORMAND N. GALE, J.), convicting defendant of consensual sodomy, and (2) dismissed the indictment.

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APPEAL, in the second above-entitled action, by permission of an Associate Judge of the Court of Appeals, from an order of the Erie County Court (PENNY M. WOLFGANG, J)., entered October 9, 1979, which affirmed a judgment of the City Court of the City of Buffalo (HERBERT R. JOHNSTON, Jr., J.), rendered upon verdicts convicting defendants of consensual sodomy.

APPEAL, in the third above-entitled action, by permission of an Associate Judge of the Court of Appeals, from an order of the Erie County Court (PENNY M. WOLFGANG, J.), entered October 9, 1979, which affirmed a judgment of the City Court of the City of Buffalo (CARMELO A. PARLATO, J.), convicting defendant of consensual sodomy.

Defendants were each convicted of consensual sodomy under section 130.38 of the Penal Law, defined as deviate sexual intercourse between persons not married to each other (Penal Law, § 130.00, subd 2). On appeal, the Appellate Division reversed in the case of defendant Onofre and dismissed the indictment, concluding that section 130.38 was unconstitutional, and the Erie County Court affirmed the convictions of defendants Peoples, Goss and Sweat, rejecting claims of the unconstitutionality of section 130.38.

The Court of Appeals (1) affirmed the order of the Appellate Division, and (2) reversed the orders of the Erie County Court and dismissed the information, holding, in an opinion by Judge JONES, that section 130.38 of the Penal Law violates defendants' constitutional rights to privacy and equal protection of the law because it is broad enough to reach noncommercial, cloistered personal sexual conduct of consenting adults and because it permits the proscribed conduct between persons married to each other without sanction.

People v Onofre, 72 AD2d 268, affirmed.

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HEADNOTE

Crimes — Sodomy — Consensual Sodomy

Section 130.38 of the Penal Law, which criminalizes consensual sodomy or deviate sexual intercourse between persons not married to each other as defined in subdivision 2 of section 130.00 of the Penal Law, is violative of rights protected by the United States Constitution because the statute is broad enough to reach noncommercial, cloistered personal sexual conduct between consenting adults and because it permits the proscribed conduct between persons married to each other without sanction; section 130.38 violates the rights of defendants convicted thereunder to privacy and to equal protection of the laws.

POINTS OF COUNSEL

Richard A. Hennessy, Jr., District Attorney (*Gail N. Uebelhoer* and *John A. Cirando* of counsel) for appellant in the first above-entitled action. I. The court below erroneously extended the *Griswold* right to privacy to encompass sodomy. (*Cooper v Morin*, 49 NY2d 69; *Doe v Commonwealth's Attorney for City of Richmond*, 403 F Supp 1199, 425 US 901; *Griswold v Connecticut*, 381 US 479; *Lovisi v Slayton*, 539 F2d 349, cert den *sub nom. Lovisi v Zahradnick, Penitentiary Supt.*, 429 US 977; *Raphael v Hogan*, 305 F Supp 749; *Matter of Dora P.*, 68 AD2d 719; *People v Rice*, 80 Misc 2d 511, 87 Misc 2d 257, 41 NY2d 1018; *People v Johnson*, 77 Misc 2d 889, 97 Misc 2d 905; *Eisenstadt v Baird*, 405 US 438; *Carey v Population Servs., Int.*, 431 US 678.) II. The court below erroneously held that marriage violates equal protection. (*Frontiero v Richardson*, 411 US 677; *San Antonio School Dist. v Rodriguez*, 411 US 1; *Village of Belle Terre v Boraas*, 416 US 1; *Griswold v Connecticut*, 381 US 479; *Frances B. v Mark B.*, 78 Misc 2d 112; *Anonymous v Anonymous*, 57 Misc

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2d 982; *Mirizio v Mirizio*, 242 NY 74; *People v Reilly*, 85 Misc 2d 702; *People v Johnson*, 77 Misc 2d 889, 97 Misc 2d 905; *Raphael v Hogan*, 305 F Supp 749.) III. The court below erroneously held that proscriptions against sodomy were an improper exercise of State power. *(People v Dozier*, 72 AD2d 478; *People v Rice*, 41 NY2d 1018; *People v Broadie*, 37 NY2d 100; *Paris Adult Theatre I v Slaton*, 413 US 49; *People v Portanova*, 56 AD2d 265; *People v Billi*, 90 Misc 2d 568.) IV. The statute is constitutional. *(Cooper v Morin*, 49 NY2d 69; *Matter of Dora P.*, 68 AD2d 719; *Raphael v Hogan*, 305 F Supp 749; *People v Johnson*, 77 Misc 2d 889, 97 Misc 2d 905; *People v Dozier*, 72 AD2d 478; *People v Broadie*, 37 NY2d 100; *People v Portanova*, 56 AD2d 265; *People v Griswold*, 213 NY 92; *Matter of Trustees of State Univ. of N.Y. v Edelman*, 76 Misc 2d 820.)

Bonnie Strunk for respondent in the first above-entitled action. I. Section 130.38 of the New York Penal Law is an unconstitutional infringement upon respondent's fundamental right to privacy. *(Olmstead v United States*, 277 US 438; *Boyd v United States*, 116 US 616; *Union Pacific Ry. Co. v Botsford*, 141 US 250; *Meyer v Nebraska*, 262 US 390; *Allgeyer v Louisiana*, 165 US 578; *Pierce v Society of Sisters*, 268 US 510; *Prince v Massachusetts*, 321 US 158; *Skinner v Oklahoma*, 316 US 535; *Poe v Ullman*, 367 US 497; *Griswold v Connecticut*, 381 US 479.) II. Respondent's right to privacy is protected by the New York State Constitution. *(Oregon v Hass*, 420 US 714; *Cooper v California*, 386 US 58; *Sibron v New York*, 392 US 40; *Cooper v Morin*, 49 NY2d 69; *People v Barber*, 289 NY 378; *Sharrock v Dell Buick-Cadillac*, 45 NY2d 152; *Ives v South Buffalo Ry. Co.*, 201 NY 271; *Matter of Jacobs*, 98 NY 98; *Bertholf v O'Reilly*, 74 NY 509; *People v Leyra*, 302 NY 353.) III. Section 130.38 of the Penal Law violates respondent's right to equal protection under the New York State and United States Constitutions. *(Matter of*

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Patricia A., 31 NY2d 83; *New York State Soc. of Med. Masseurs v City of New York*, 74 Misc 2d 573; *Stanley v Georgia*, 394 US 557; *Eisenstadt v Baird*, 405 US 438; *Railway Express v New York*, 336 US 106; *People v Rice*, 80 Misc 2d 511; *Lovisi v Slayton*, 363 F Supp 620; *Matter of P.*, 92 Misc 2d 62, revd *sub nom. Matter of Dora P.*, 68 AD2d 719; *McGowan v Maryland*, 366 US 420; *United States Dept. of Agric. v Moreno*, 413 US 528.) IV. Section 130.38 of the Penal Law violates the due process guarantee of the New York and United States Constitutions. *(Matter of Toia v Regan*, 54 AD2d 46, 40 NY2d 837; *Barbier v Connolly*, 113 US 27; *Patterson v Carey*, 41 NY2d 714; *Eisenstadt v Baird*, 405 US 438; *Baker v Carr*, 369 US 186.) V. The consensual sodomy statute does not serve any reasonable or legitimate State interest. *(People v Dozier*, 72 AD2d 478; *People v Billi*, 90 Misc 2d 568; *People v Bunis*, 9 NY2d 1; *Stanley v Georgia*, 394 US 557; *Goldberg v Kelly*, 397 US 254; *Hannah v Larche*, 363 US 420.) VI. Section 130.38 violates the establishment clause of the First Amendment and section 3 of article I of the New York State Constitution. *(Engel v Vitale*, 370 US 421; *Committee for Public Educ. v Nyquist*, 413 US 756; *Epperson v Arkansas*, 393 US 97; *Everson v Board of Educ.*, 330 US 1; *Abington School Dist. v Schempp*, 373 US 203; *McGowan v Maryland*, 366 US 420; *McCollum v Board of Educ.*, 333 US 203; *Serbian Orthodox Diocese v Milivojevich*, 426 US 696.) VII. Respondent's challenge to the constitutionality of New York's consensual sodomy law raises substantial Federal questions that were neither resolved or precluded by the Supreme Court's summary affirmance of *Doe v Commonwealth's Attorney. (Doe v Commonwealth's Attorney for City of Richmond*, 403 F Supp 1199, 425 US 901; *Hicks v Miranda*, 422 US 332; *Gibson v Berryhill*, 411 US 564; *Edelman v Jordan*, 415 US 651; *Fusari v Steinberg*, 419 US 379; *Dillenburg v Kramer*, 469 F2d 1222;

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Jordan v Gilligan, 500 F2d 701, 421 US 991; *Fisher v Secretary of U.S. Dept. of Health, Educ. & Welfare*, 522 F2d 493; *Ashwander v Valley Auth.*, 297 US 288; *Abbott Labs. v Gardner*, 387 US 136.)

Bruce V. Bordelon, Shepherd I. Raimi and *Jo-Ann H. Whitehorn* for The Special Committee on Sex and Law of the Association of the Bar of the City of New York, *amicus curiae*, in the first above-entitled action. The court below correctly struck down New York's consensual sodomy statute as violative of all citizens' — heterosexual as well as homosexual — rights of privacy. *(Doe v Commonwealth's Attorney for City of Richmond*, 403 F Supp 1199, 425 US 901; *Griswold v Connecticut*, 381 US 479; *Eisenstadt v Baird*, 405 US 438; *Roe v Wade*, 410 US 113; *Carey v Population Servs. Int.*, 431 US 678; *Stanley v Georgia*, 397 US 557; *Terry v Ohio*, 392 US 1; *Loving v Virginia*, 388 US 1; *Matter of Dora P.*, 68 AD2d 719; *Roberson v Rochester Folding Box Co.*, 171 NY 538.)

Barbara Ellen Handschu for National Committee for Sexual Civil Liberties, *amicus curiae* in the first above-entitled action. I. The right of privacy is involved herein both under the Federal and the State Constitutions. *(Central Sav. Bank in City of N.Y. v City of New York*, 280 NY 9; *Cooper v Morin*, 49 NY2d 69; *Doe v Commonwealth's Attorney for City of Richmond*, 403 F Supp 1199, 425 US 901; *Dorsey v Stuyvesant Town Corp.*, 299 NY 512; *Fuentes v Shevin*, 407 US 67; *Fusari v Steinberg*, 419 US 379; *Griswold v Connecticut*, 381 US 479; *Mandel v Bradley*, 432 US 173; *Matter of P.*, 92 Misc 2d 62, revd *sub nom. Matter of Dora P.*, 68 AD2d 719.) II. Section 130.38 of the Penal Law is an improper invasion of the right of privacy. *(Jacobellis v Ohio*, 378 US 184; *Paris Adult Theater I v Slaton*, 413 US 49; *People v Onofre*, 72 AD2d 268; *People v Rice*, 41 NY2d 1018; *Roe v Wade*, 410 US 113; *Stanley v Georgia*, 394 US 557.)

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Thomas B. Stoddard and *Steven R. Shapiro* for New York Civil Liberties Union, *amicus curiae* in the first above-entitled action. I. This court should explicitly recognize a right to privacy under the Constitution of the State of New York. *(Olmstead v United States*, 277 US 438; *Griswold v Connecticut*, 381 US 479; *Eisenstadt v Baird*, 405 US 438; *Roe v Wade*, 410 US 113; *Carey v Population Servs. Int.*, 431 US 678; *Spahn v Julian Messner, Inc.*, 43 Misc 2d 219, 23 AD2d 216, 18 NY2d 324; *Time, Inc. v Hill*, 385 US 374; *Matter of A & M*, 61 AD2d 426; *Matter of P.*, 92 Misc 2d 62, revd *sub nom. Matter of Dora P.*, 68 AD2d 719; *Matter of Fraser v Brown*, 203 NY 136). II. Private sexual activity between consenting adults should be protected by any right of privacy recognized under the State Constitution and, on that basis, section 130.38 of the Penal Law must be struck down. *(People v Rice*, 41 NY2d 1018; *Katz v United States*, 389 US 347; *Roe v Wade*, 410 US 113.) III. The right to privacy guaranteed by the United States Constitution protects private sexual activity between consenting adults. *(Griswold v Connecticut*, 381 US 479; *Eisenstadt v Baird*, 405 US 438; *Skinner v Oklahoma*, 316 US 535; *Whalen v Roe*, 429 US 589; *Doe v Commonwealth's Attorney for City of Richmond*, 403 F Supp 1199, 425 US 901; *Carey v Population Servs. Int.*, 431 US 678; *Stanley v Georgia*, 394 US 557.)

Margot Karle and *Rosalyn H. Richter* for Lambda Legal Defense & Education Fund, Inc., *amicus curiae* in the first above-entitled action. I. The court below correctly held section 130.38 of the Penal Law is unconstitutional as violative of the right to privacy. *(Carey v Population Servs. Inc.*, 431 US 678; *Cooper v Morin*, 49 NY2d 69; *Doe v Bolton*, 410 US 179; *Doe v Commonwealth's Attorney for City of Richmond*, 403 F Supp 1199, 425 US 901; *Eisenstadt v Baird*, 405 US 438; *Griswold v*

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Connecticut, 381 US 479; *Lovisi v Slayton*, 539 F2d 349; *Planned Parenthood of Mo. v Danforth*, 428 US 52; *Roe v Wade*, 410 US 113; *Stanley v Georgia*, 394 US 557.) II. The court below correctly held section 130.38 as violative of the equal protection clause. (*Acanfora v Board of Educ.*, 359 F Supp 843, 491 F2d 498, 419 US 836; *Eisenstadt v Baird*, 405 US 438; *Griswold v Connecticut*, 381 US 479; *Matter of P.*, 92 Misc 2d 62, revd *sub nom. Matter of Dora P.*, 68 AD2d 719; *Korematsu v United States*, 323 US 214; *Maher v Roe*, 432 US 464; *Mathews v Lucas*, 427 US 495; *Memorial Hosp. v Maricopa County*, 415 US 250; *San Antonio School Dist. v Rodriguez*, 411 US 1.) III. Section 130.38 should be held unconstitutional under the provisions of the New York Constitution irrespective of the interpretation under the Federal Constitution. (*Cooper v Morin*, 49 NY2d 69; *People v Fiedler*, 31 NY2d 176; *People v Isaacson*, 44 NY2d 511; *Sharrock v Del Buick-Cadillac*, 45 NY2d 152; *Wilkinson v Skinner*, 34 NY2d 53.)

William H. Gardner and *Dianne Bennett* for appellants in the second and third above-entitled actions. I. The New York consensual sodomy statute is unconstitutional as an impermissible invasion of privacy. (*People v Onofre*, 72 AD2d 268; *Griswold v Connecticut*, 381 US 479; *Stanley v Georgia*, 394 US 557; *Eisenstadt v Baird*, 405 US 438; *Roe v Wade*, 410 US 113; *Boyd v United States*, 116 US 616; *Union Pacific Ry. Co. v Botsford*, 141 US 250; *Meyer v Nebraska*, 262 US 390; *Pierce v Society of Sisters*, 268 US 510; *Prince v Massachusetts*, 321 US 158; *Skinner v Oklahoma*, 316 US 535.) II. Appellants have standing to raise the right of privacy in support of their effort to have their convictions set aside. (*People v Rice*, 41 NY2d 1018; *Griswold v Connecticut*, 381 US 479; *Orr v Orr*, 440 US 268.) III. The New York consensual sodomy statute is unconstitutional as a violation of the rights to the equal protection of the laws of those

who are subject to it, as a result of the distinction made in the statute between married and unmarried persons. —*Griswold v Connecticut*, 381 US 479.) IV. Regardless of the result under the United States Constitution, this court should hold the statute unconstitutional under applicable provisions of the New York Constitution. (*Cooper v Morin*, 49 NY2d 69; *Cohen v Hurley*, 366 US 117; *Oregon v Hass*, 420 US 714; *Sharrock v Del Buick-Cadillac*, 45 NY2d 152; *People v Isaacson*, 44 NY2d 511.) V. The court should strike down the consensual sodomy statute (Penal Law, § 130.38) in its entirety. (*Matter of Lyons v Goldstein*, 290 NY 19; *People v Finkelstein*, 9 NY2d 342; *Courtesy Sandwich Shop v Port of N.Y. Auth.*, 12 NY2d 379; *People v Epton*, 19 NY2d 496; *People v Kaiser*, 21 NY2d 86; *Spahn v Julian Messner, Inc.*, 21 NY2d 124; *Matter of Seitz v Drogheo*, 21 NY2d 181; *People v Bailey*, 21 NY2d 588.) VI. Appellants have established that their prosecution is the result of discriminatory enforcement, resulting in a violation of their constitutional right to equal protection of the laws. (*Yick Wo v Hopkins*, 118 US 356; *People v Utica Daw's Drug Co.*, 16 AD2d 12; *People v Friedman*, 302 NY 75; *People v Goodman*, 31 NY2d 262; *Matter of 303 West 42nd St. Corp. v Klein*, 46 NY2d 686; *Matter of Di Maggio v Brown*, 19 NY2d 283; *Snowden v Hughes*, 321 US 1; *Gomillion v Lightfoot*, 364 US 339; *Oyler v Boles*, 368 US 448; *People v Walker*, 14 NY2d 901.)

Edward C. Cosgrove, District Attorney (John J. De Franks of counsel), for respondent in the second and third above-entitled actions. I. The constitutionally recognized right to privacy does not protect acts of consensual sodomy committed by individuals in automobiles parked on public streets (*Griswold v Connecticut*, 381 US 479; *Poe v Ullman*, 367 US 497; *Stanley v Georgia*, 394 US 557; *Eisenstadt v Baird*, 405 US 438; *Roe v Wade*, 410 US 113; *Skinner v Oklahoma*, 316 US 535; *Doe v Commonwealth's At-*

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torney for City of Richmond, 403 F Supp 1199, 425 US 901; *People v Rice*, 41 NY2d 1018.) II. Appellants lack standing to assert a right to privacy in the present cases. III. Section 130.38 of the Penal Law is not violative of the right to equal protection of the law. (*Griswold v Connecticut*, 381 US 479; *People v Rice*, 87 Misc 2d 257; *Raphael v Hogan*, 305 F Supp 749; *Near v Minnesota*, 283 US 697; *Matter of Levy*, 38 NY2d 653.) IV. Section 130.38 of the Penal Law should not be held to be unconstitutional under this State's Constitution. (*Cooper v Morin*, 49 NY2d 69.) V. Even if section 130.38 of the Penal Law is found unconstitutional with respect to private conduct, the statute should be held to be valid with respect to sodomous acts performed in public areas. VI. The trial court properly denied appellant's claim of discriminatory enforcement of the statute in the absence of any evidence to support such a claim. (*Yick Wo v Hopkins*, 118 US 356; *People v Utica Daw's Drug Co.*, 16 AD2d 12; *People v Goodman*, 31 NY2d 262.)

OPINION OF THE COURT

JONES, J.

These appeals, argued together, present a common question — viz., whether the provision of our State's Penal Law that makes consensual sodomy a crime is violative of rights protected by the United States Constitution. We hold that it is.

Defendant Onofre was convicted in County Court of Onondaga County of violating section 130.38 of the Penal Law (consensual sodomy) after his admission to having committed acts of deviate sexual intercourse with a 17-year-old male at defendant's home.[1]

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[1]Defendant's conviction was not predicated on a guilty plea as inadvertently recited in the opinion at the Appellate Division.

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The factual admission followed the court's denial of defendant's motion to dismiss the indictment on the ground that the statute was an invasion of his constitutionality protected right of privacy and that it denied him equal protection of the laws.

Defendants Peoples and Goss were convicted in Buffalo City Court in violating the consensual sodomy statute after a jury trial at which evidence was adduced that they had engaged in an act of oral sodomy in an automobile parked on a street in the City of Buffalo in the early morning hours. Defendant Sweat was convicted of the same crime after a jury trial in the same court on proof that she had committed a similar act with a male in a truck parked on a street in a residential area of the city about 1:30 A.M. In the cases in Buffalo City Court motions by defendants for dismissals of the informations on the ground that section 130.38 of the Penal Law is unconstitutional because it deprives them of equal protection of the law and denies their right of privacy had been denied.

On appeal by defendants from the judgments of conviction the Appellate Division, Fourth Department, reversed in the case of Onofre and dismissed the indictment, concluding that section 130.38 of the Penal Law was unconstitutional and the County Court of Erie County affirmed the convictions of Peoples, Goss and Sweat, rejecting the claims of unconstitutionality. The order of the Appellate Division should be affirmed; those of County Court should be reversed and the informations dismissed.

The statutes under which these defendants were charged and convicted provide as follows:

"§ 130.38 Consensual sodomy.

"A person is guilty of consensual sodomy when he engages in deviate sexual intercourse with another person.

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"§ 130.00 Sex offenses; definitions of terms.

"The following definitions are applicable to this article:

* * *

"2. Deviate sexual intercourse means sexual conduct between persons not married to each other consisting of contact between the penis and the anus, the mouth and penis, or the mouth and the vulva."

Because the statutes are broad enough to reach noncommercial, cloistered personal sexual conduct of consenting adults, and because it permits the same conduct between persons married to each other without sanction, we agree with defendants' contentions that it violates both their right of privacy[2] and the right to equal protection of the laws guaranteed them by the United States Constitution.

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[2]We are not unmindful that both District Attorneys seek to draw support from conduct by defendants which they claim either drew the admitted acts of sodomy into the classification of public, not private, conduct or which constituted a waiver of the right to assert a right of privacy. Because our disposition of these appeals rests also on a denial of equal protection rights we need not pass on the contention by the District Attorney of Erie County that the acts committed by defendants Peoples, Goss and Sweat, occurring in vehicles parked on a street or highway at times when traffic might be expected to be light but which could have been observed by a passerby should one have happened on the vehicles and looked inside, lost any claim to being private acts. (On oral argument counsel for the defendants expressly conceded that the acts took place "in public".) The suggestion by the District Attorney of Onondaga County that because defendant Onofre presumably participated in the taking of photographs of himself while engaging in acts of sodomy and thereafter displayed such photographs to the District Attorney, he was foreclosed from asserting a right of privacy fails to distinguish between the two aspects of the right as subsequently discussed. Neither the photographing nor the display of the pictures (which was done

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As to the right of privacy. At the outset it should be noted that the right addressed in the present context is not, as a literal reading of the phrase might suggest, the right to maintain secrecy with respect to one's affairs or personal behavior; rather, it is a right of independence in making certain kinds of important decisions, with a concomitant right to conduct oneself in accordance with those decisions, undeterred by governmental restraint — what we referred to in *People v Rice* (41 NY2d 1018, 1019) as "freedom of conduct". (See *Whalen v Roe*, 429 US 589, 598-600.) The right, which has been called "the most comprehensive of rights and the right most valued by civilized men" (*Olmstead v United States*, 277 US 438, 478 [BRANDEIS, J., dissenting]), "has been viewed as emanating from the first amendment's guarantee of freedom of association, *NAACP v. Alabama*, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958); and of speech, *Stanley v. Georgia*, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969); the fourth amendment, *Terry v. Ohio*, 392 US. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); the equal protection clause of the fourteenth amendment, *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967); the ninth amendment, *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) (Goldberg, J., concurring); the penumbras of

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—*Footnote continued from preceding page*

only after charges of sodomy in the first degree and sexual abuse had been laid against him) affected the secluded nature of the conduct, which was done in defendant's own home free from any observation by the public, although, conceivably, he may thereby have lost any claim to the secrecy aspect of the right to privacy — an aspect he is not now asserting. No distinction between these two aspects was observed in *Lovisi v Slayton* (363 F Supp 620, affd 539 F2d 349, cert den 429 US 977), the decision which appears to have turned on defendants' failure to keep the photographs in such a way that their children would be denied access to them, which the court regarded as a breach of defendants' responsibility to ensure that the seclusion surrounding their acts was preserved (363 F Supp, p 627).

the Bill of Rights, *id.*, and the concept of liberty guaranteed by the due process clause of the fourteenth amendment, *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973)" *(Lovisi v Slayton*, 363 F Supp 620, 624, affd 539 F2d 349, cert den 429 US 977, *supra*).

As recently as 1976 the Supreme Court took pains in *Carey v Population Servs. Int.* (431 US 678, 684-685) to observe that "the outer limits" of the decision-making aspect of the right of privacy "have not been marked by the Court", noting however that "among the decisions that an individual may make without unjustified government interference" are personal decisions relating to marriage *(Loving v Virginia*, 388 US 1, 12, *supra*), procreation *(Skinner v Oklahoma*, 316 US 535, 541-542), contraception *(Eisenstadt v Baird*, 405 US 438, 453-454), family relationships *(Prince v Massachusetts*, 321 US 158, 166), child rearing and education *(Pierce v Society of Sisters*, 268 US 510, 535; *Meyer v Nebraska*, 262 US 390, 399), and abortion *(Roe v Wade*, 410 US 113, 154, *supra)*.

The People are in no disagreement that a fundamental right of personal decision exists; the divergence of the parties focuses on what subjects fall within its protection, the People contending that it extends to only two aspects of sexual behavior — marital intimacy (by virtue of the Supreme Court's decision in *Griswold v Connecticut* [381 US 479, *supra*]) and procreative choice (by reason of *Eisenstadt v Baird* [405 US 438, *supra*] and *Roe v Wade* [410 US 113, *supra*]). Such a stance fails however adequately to take into account the decision in *Stanley v Georgia* (394 US 557, *supra)* and the explication of the right of privacy contained in the court's opinion in *Eisenstadt*. In *Stanley* the court found violative of the individual's right to be free from governmental interference in making important, protected decisions a statute

which made criminal the possession of obscene matter within the privacy of the defendant's home. Although the material itself was entitled to no protection against government proscription *(Roth v United States*, 354 US 476) the defendant's choice to seek sexual gratification by viewing it and the effectuation of that choice within the bastion of his home, removed from the public eye, was held to be blanketed by the constitutional right of privacy. That the right enunciated in *Griswold v Connecticut* (381 US 479, *supra)* to make decisions with respect to the consequence of sexual encounters and necessarily, to have such encounters, was not limited to married couples was made clear by the language of the court in *Eisenstadt v Baird* (405 US 438, 453, *supra)*: "It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child. See *Stanley v. Georgia*, 394 U.S. 557 (1969)." In a footnote appended to the *Stanley* citation the court set out the following quotation from that decision (p 453, n 10):

" '[A]lso fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrustions into one's privacy.

" ' "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They

sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone — the most comprehensive of rights and the right most valued by civilized man." *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)." ' "

In light of these decisions, protecting under the cloak of the right of privacy individual decisions as to indulgence in acts of sexual intimacy by unmarried persons and as to satisfaction of sexual desires by resort to material condemned as obscene by community standards when done in a cloistered setting, no rational basis appears for excluding from the same protection decisions — such as those made by defendants before us — to seek sexual gratification from what at least once was commonly regarded as "deviant" conduct,[3] so long as the decisions are

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[3]We express no view as to any theological, moral or psychological evaluation of consensual sodomy. These are aspects of the issue on which informed, competent authorities and individuals may and do differ. Contrary to the view expressed by the dissent, although on occasion it does serve such ends, it is not the function of the Penal Law in our governmental policy to provide either a medium for the articulation or the apparatus for the intended enforcement of moral or theological values. Thus, it has been deemed irrelevant by the United States Supreme Court that the purchase and use of contraceptives by unmarried persons would arouse moral indignation among broad segments of our community or that the viewing of pornographic materials even within the privacy of one's home would not evoke general approbation *(Eisenstadt v Baird*, 405 US 438, *supra*; *Stanley v Georgia*, 394 US 557, *supra)*. We are not unmindful of the sensibilities of many persons who are deeply persuaded that consensual sodomy is evil and should be prohibited. That is not the issue before us. The issue before us is whether, assuming that at least at present it is the will of the community (as expressed in legislative enactment) to prohibit consensual sodomy, the Federal Constitution permits recourse to the sanctions of the criminal law for the achievement of that objective. The community and its members are

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voluntarily made by adults in a noncommercial, private setting. Nor is any such basis supplied by the claims advanced by the prosecution — that a prohibition against consensual sodomy will prevent physical harm which might otherwise befall the participants, will uphold public morality and will protect the institution of marriage. Commendable though these objectives clearly are, there is nothing on which to base a conclusion that they are achieved by section 130.38 of the Penal Law. No showing has been made, even in references tendered in the briefs, that physical injury is a common or even occasional consequence of the prohibited conduct, and there has been no demonstration either that this is a danger presently addressed by the statute or was one apprehended at the time the statutory section was enacted contemporaneously with the adoption of the new Penal Law in 1965. Indeed, the proposed comprehensive penal statute submitted to the Legislature by the Temporary Commission on Revision of the Penal Law and Criminal Code dropped all proscription against private acts of consensual sodomy.[4] That enactment of section 130.38 of the Penal Law was prompted by something other than fear for the physical safety of participants in consensual sodomy is suggested by the statement

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—*Footnote continued from preceding page*

entirely free to employ theological teaching, moral suasion, parental advise, psychological and psychiatric counseling and other noncoercive means to condemn the practice of consensual sodomy. The narrow question before us is whether the Federal Constitution permits the use of the criminal law for that purpose.

4Notable also is the fact that when the Model Penal Code was adopted by the American Law Institute a subsection which would have made consensual sodomy a misdemeanor (§207.5, subd [4]) was consciously omitted (ABA-ALI Model Penal Code, Proposed Official Draft, §213.2, Status of Section, pp 145-146; Tent Draft No. 4, pp 93, 276).

contained in the memorandum prepared by the chairman of the Temporary Commission: "It would appear that the Legislature's decision to restore the consensual sodomy offense was, as with adultery, based largely upon the premises that deletion thereof might ostensibly be construed as legislative approval of deviate conduct" (NY Legis Ann, 1965, pp 51-52).

Any purported justification for the consensual sodomy statute in terms of upholding public morality is belied by the position reflected in the *Eisenstadt* decision in which the court carefully distinguished between public dissemination of what might have been considered inimical to public morality and individual recourse to the same material out of the public arena and in the sanctum of the private home. There is a distinction between public and private morality and the private morality of an individual is not synonymous with nor necessarily will have effect on what is known as public morality (see *State v Saunders*, 75 NJ 200, 218-220). So here, the People have failed to demonstrate how government interference with the practice of personal choice in matters of intimate sexual behavior out of view of the public and with no commercial component will serve to advance the cause of public morality or do anything other than restrict individual conduct and impose a concept of private morality chosen by the State.

Finally, the records and the written and oral arguments of the District Attorneys as well are devoid of any support for the statement that a prohibition against consensual sodomy will promote or protect the institution of marriage, venerable and worthy as is that estate. Certainly there is no suggestion that the one is a substitute or alternative for the other nor is any empirical data submitted which demonstrates that marriage is nothing more than a refuge for persons deprived by legislative fiat of the option of consensual sodomy outside the marital bond.

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In sum, there has been no showing of any threat, either to participants or the public in general, in consequence of the voluntary engagement by adults in private, dicreet, sodomous conduct. Absent is the factor of commercialization with the attendant evils commonly attached to the retailing of sexual pleasures; absent the elements of force or of involvement of minors which might constitute compulsion of unwilling participants or of those too young to make an informed choice, and absent too intrusion on the sensibilities of members of the public, many of whom would be offended by being exposed to the intimacies of others. Personal feelings of distaste for the conduct sought to be proscribed by section 130.38 of the Penal Law and even disapproval by a majority of the populace, if that disapproval were to be assumed, may not substitute for the required demonstration of a valid basis for intrusion by the State in an area of important personal decision protected under the right of privacy drawn from the United States Constitution — areas, the number and definition of which have steadily grown but, as the Supreme Court has observed, the outer limits of which it has not yet marked.

The assertion in the dissent that validation of the consensual sodomy statute is mandated by our recent decision in *People v Shepard* (50 NY2d 640) proceeds from a misconception of our holding in *Shepard*. In that case we upheld the constitutionality of the statutory proscription against the possession of marihuana as applied to possession by an individual in the privacy of his home, noting the existence of a legitimate controversy with respect to whether marihuana is a dangerous substance. The concurring opinion assembled the impressive evidence of the harmfulness which attends the use of marihuana. On such a record we sustained the right of the Legislature to reach the substantive conclusion that the use of marihuana was

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indeed harmful and accordingly to impose a criminal proscription based on that predicate. There is in the present case no basis for a counterpart to the statement in *Shepard* that "the Legislature, following extensive studies and hearings, has specifically found the drug to be sufficiently harmful to warrant punishing its possession in an effort to deter its use" (p 646). By critical contrast neither the People nor the dissent has cited any authority or evidence for the proposition that the practice of consensual sodomy in private is harmful either to the participants or to society in general; indeed, the dissent's appeal is only to the historical, conventional characterization which attached to the practice of sodomy.[5] It surely does not follow that, because it is constitutionally permissible to enter the privacy of an individual's home to regulate conduct justifiably found to be harmful to him, the Legislature may also intrude on such privacy to regulate individual conduct where no basis has been shown for concluding that the conduct is harmful.

As to the denial of defendants' right to equal protection. Section 130.38 of the Penal Law on its face discriminates between married and unmarried persons, making criminal when done by the latter what is innocent when done by the former. With that distinction drawn, we look to see whether there is, as a minimum, "some ground of difference that rationally explains the different treatment accorded married and unmarried persons" under the statute *(Eisenstadt v Baird*, 405 US 438, 447,

[5]Twenty-two States have now decriminalized consensual sodomy between adults in private (Rivera, Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States, 30 Hastings LJ 799, 950-951; NJ Stats Ann, § 2C:98-2).

supra).[6] In our view, none has been demonstrated or identified by the People in any of the cases before us. In fact, the only justifications suggested are a societal interest in protecting and nurturing the institution of marriage and what are termed "rights accorded married persons". As has been indicated, however, no showing has been made as to how, or even that, the statute banning consensual sodomy between persons not married to each other preserves or fosters marriage. Nor is there any suggestion how consensual sodomy relates to rights accorded married persons; certainly it is not evident how it adversely affects any such rights. Thus, even if it be assumed that the objectives tendered by the prosecution are legitimate matters of public concern, no relationship — much less rational relationship — between those objectives and the proscription of section 130.38 of the Penal Law is manifested. The statute therefore must fall as violative of the right to equal protection enjoyed by persons not married to each other.

Little more need be said to dispose of the contention made by the District Attorneys that the statute is a valid exercise of the police power vested in the State, which power, it is asserted, is authorized for the prevention of harm or for the preservation of public morality. No substantial prospect of harm from consensual sodomy nor any threat to public — as opposed to private — morality has been shown.

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[6]If we are correct in the view earlier expressed in this opinion that section 130.38 of the Penal Law infringes on defendants' right of privacy which is a fundamental right, then, as observed, in *Eisenstadt*, the statutory classification "would have to be not merely *rationally related* to a valid public purpose but *necessary* to the achievement of a *compelling* state interest (405 US, p 447, n 7). As was so in *Eisenstadt*, however, we do not need to measure the statute by that test inasmuch as it fails to satisfy even the more lenient rational basis standard.

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Finally, we do not plow new ground in the result we reach today. Most recently, the Supreme Court of Pennsylvania, for some of the same reasons that underlie our decision, has reached a similar conclusion even in a case in which the defendants were charged with commission of deviant acts of sexual conduct with members of the audience at performances in a public theatre for which an admission fee had been charged *(Commonwealth v Bonadio,* ____Pa____, 415 A2d 47 [Pa]). Also consistent with the result we reach are the decisions by the Iowa Supreme Court in *State v Pilcher* (242 NW2d 348 [Iowa]) and by the New Jersey Superior Court in *State v Ciuffini* (164 NJ Super 145), relying on the earlier case of *State v Saunders* (75 NJ 200, *supra)* in which its Supreme Court had invalidated as contrary to the constitutionally protected right of privacy a statute making fornication a criminal offense. Nor is any contrary result compelled by *Doe v Commonwealth's Attorney for City of Richmond* (403 F Supp 1199, affd 425 US 901), a civil action in which prayers for a declaratory judgment invalidating and an injunction precluding prosecution under a Virginia sodomy statute, which expressly included consensual sodomy, were denied. Although the District Court in its opinion addressed the constitutionality of the statute and concluded that it was not invalid, its disposition included no declaration of constitutionality, but merely denied the relief requested and dismissed the complaint. A summary affirmance of the dismissal without declaration followed in the United States Supreme Court. In that circumstance the disposition by the Supreme Court does not necessarily signify approval of the reasoning by which the lower court resolved the case *(Fusari v Steinberg,* 419 US 379, 391 [concurring opn by BURGER, Ch. J.]). Apart from the limited precedential value of a summary affirmance (see, e.g., *Edelman v Jordan,* 415 US 651, 671; Hart & Wechsler, Federal Courts and the Federal System

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[1977 Supp], at p 112, n 1) in *Doe* there was lacking any evidence of threatened prosecution of the plaintiffs under the Virginia statute — a factor arguably relevant to their standing to maintain the action (cf. *O'Shea v Littleton*, 414 US 488). Thus, the affirmance by the Supreme Court of the District Court's dismissal of the action may have been predicated on a lack of standing on the part of plaintiffs. Subsequent to the decision of the *Doe* case a member of that court stated that the court had not yet "definitely answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating such behavior (private consensual sexual behavior) among adults" *(Carey v Population Servs. Int.*, 431 US 678, 694, n 17 [opn by BRENNAN, J., concurred in by a plurality], *supra)*.

That difficult question, to the extent that it is posed by these appeals, is before us now. For the reasons given above, we conclude that the imposition of criminal sanctions such as those contained in section 130.38 of the Penal Law is proscribed by the Constitution of the United States.

Accordingly, on the appeal by the District Attorney of Onondaga County the order of the Appellate Division should be affirmed. On the appeals by defendants Peoples, Goss and Sweat the orders of the Erie County Court should be reversed, the convictions vacated and the informations dismissed.

JASEN, J. (concurring in result). While I cannot accept the majority's premise that the so-called "penumbral" right to privacy which first appeared in *Griswold v Connecticut* (381 US 479) should be extended to encompass and protect any and all types of consensual sexual behavior in private, I nonetheless concur in result herein for I can discern no rational basis upon which the Legislature could have decided to freely allow the conduct in issue among married people and to make identical

conduct criminal among those for whom that estate is undesirable or unattainable.

I hasten to add that, in my opinion, the Legislature does have the power to make moral judgments. However, that legislative power is, as all others are, limited by the supervening requirement that it be exercised with the requisite evenhandedness. Here, it was not.

GABRIELLI, J. (dissenting). Without making any effort to define its boundaries or limitations, a majority of my colleagues has recognized for the first time a constitutional right of personal autonomy broad enough to encompass at least the freedom to indulge in those sexual practices which have long been proscribed by our criminal law. Although the majority has attempted to associate this "fundamental right" with the recent Supreme Court decisions creating a "zone of privacy" to protect certain familial decisions, it is apparent that the connection between this case and those decisions exists only on the most superficial level and that the right of sexual choice established today is really a wholly new legal concept bearing little resemblance to the familiar principles enunciated in *Griswold v Connecticut* (381 US 479) and its progeny. Because I cannot concur in the substance of the majority's conclusion and because I am concerned with the majority's failure to articulate an analytical framework for resolving future claims under this amorphous concept of personal autonomy, I am compelled to cast my vote in dissent.

I begin with the premise that none of the cases relied upon by the majority stand for the proposition that there is a generalized right of privacy or personal autonomy implicit in the Federal Bill of Rights. Nor do the cases cited in the majority opinion provide support for the idea that the courts may invoke the due

process clause of the Fourteenth Amendment as a predicate for striking down the penal provisions which some members of the judiciary may find distasteful or inconsistent with their own notions of fundamental fairness. Indeed, were that not the case, we could not have held as we recently did in *People v Shepard* (50 NY2d 640) that the statutory ban on the private possession of marihuana (see Penal Law, § 220.03) is not an unconstitutional infringement of the right of an individual to do as he pleases in his own home. To the contrary, had we concluded in *Shepard* as the majority seems to have concluded in this case that the freedom to choose one's own form of sensory gratification within the confines of one's own home is a constitutionally protected "fundamental" right, we could not have sustained the statute at issue in that case on the basis of mere "rationality", but would instead have been duty bound to conduct a more searching inquiry to determine whether the State's interest in the legislative ban was truly "compelling" (see, e.g., *Roe v Wade*, 410 US 113; *Shapiro v Thompson*, 394 US 618; *Griswold v Connecticut*, 381 US 479, *supra*).

Arguing that the People have failed to demonstrate that individuals who engage in consensual acts of sodomy are likely to suffer any serious physical side effects, the majority has attempted to distinguish the statutory prohibition at issue in *Shepard* from that at issue in this case by stressing that the ban which we upheld in *Shepard* was justified by a rational legislative finding that marihuana use can be physically harmful (pp 490-491). This assertion, however, represents a seriously flawed understanding of the inquiry that must be pursued in identifying such rights.

In order to determine whether the freedom to engage in a particular activity is a constitutionally protected "fundamental right", we must look directly to the specific guarantees outlined

in the body of the Constitution and the Bill of Rights and to the "penumbras, formed by emanations from those guarant[ees]" *(Griswold v Connecticut*, 381 US 479, 484, *supra)*. The nature and extent of the State's interest in regulating or proscribing the activity in question are simply not relevant considerations at this stage of the inquiry. Indeed, it is only after the court makes a threshold determination as to whether a particular State regulation impinges upon a "fundamental right" that such considerations are brought into play. If it is determined, for example, that a "fundamental right" is being impaired, the regulation at issue cannot be sustained unless it is narrowly tailored to effectuate some "compelling" governmental interest, such as the State's interest in protecting the health of its citizens (see *Roe v Wade*, 410 US 113, *supra; Shapiro v Thompson*, 394 US 618, *supra)*. On the other hand, once it is established that no "fundamental rights" are at issue, the court may uphold the State enactment if it is merely rationally related to some legitimate governmental purpose which falls within the State's broad police powers (e.g., *People v Shepard*, 50 NY2d 640, *supra)*. By suggesting that the activity proscribed in this case involves a "fundamental right" simply because it entails no significant danger to health, the majority has created a truly circular constitutional theory and has, in effect, injected an additional level of confusion into this already rather murky area of the law.

Under the analysis utilized by the majority, *all* private, consensual conduct would necessarily involve the exercise of a constitutionally protected "fundamental right" unless the conduct in question jeopardizes the physical health of the participant. In effect, the majority has held that a State statute regulating private conduct will not pass constitutional muster if

it is not designed to prevent physical harm to the individual. Such an analysis, however, can only be based upon an unnecessarily restrictive view of the scope of the State's power to regulate the conduct of its citizens. In my view, the so-called "police powers" of the State must include the right of the State to regulate the moral conduct of its citizens and "to maintain a decent society" (*Jacobellis v Ohio*, 378 US 184, 199, quoted in *Paris Adult Theatre I v Slaton*, 413 US 49, 59-60). Indeed, without mentioning specific provisions, it is apparent that our State's penal code represents, in part, an expression of our society's collective view as to what is or is not morally acceptable conduct. And, although the Legislature may not exercise this power in a manner that would impair a constitutionally protected "fundamental right", it begs the question to suggest, as the majority has, that such a right is necessarily involved whenever the State seeks to regulate conduct pursuant only to its interest in the moral well-being of its citizenry.

We may avoid the circularity in the majority's reasoning in cases such as this only if we utilize a two-tiered approach, taking care to ascertain at the outset whether a "fundamental right" is actually implicated without regard to the nature of the governmental interest involved in the challenged statute. If no such right is found to exist, we must refrain from interfering with the choice made by the Legislature and rest content upon the assurance that when the challenged statute is no longer palatable to the moral sensibilities of a majority of our State's citizens, it will simply be repealed.

Although our decision to sustain the statute challenged in *Shepard* under settled principles of judicial restraint would seem dispositive of the issue in this case, the majority has nonetheless adopted a contrary view and has placed the claim of personal

autonomy asserted by defendants in the category of those ill-defined fundamental rights which are protected by the "penumbras" emanating from the Bill of Rights *(Griswold v Connecticut, supra,* at pp 484-485) and by the concept of ordered liberty implicit in the due process clause of the Fourteenth Amendment *(Roe v Wade, supra,* at pp 152-153). I cannot agree, however, that the right of an individual to select his own form of sexual gratification should stand on any better footing than does the right of an individual to choose his own brand of intoxicant without government interference. Admittedly, the issue in this case is superficially distinguishable from the issue in *Shepard,* in that here we are concerned with a claim involving freedom of sexual expression, and it is therefore tempting to equate the "right" asserted by defendants with other well-established sexually related rights such as the right of an individual to obtain contraceptives *(Griswold v Connecticut, supra),* the right of a woman to terminate an unwanted pregnancy *(Roe v Wade, supra;* see *Doe v Bolton,* 410 US 179) and the right of a citizen to consume printed pornographic material in the privacy of his own home *(Stanley v Georgia,* 394 US 557). But the decisions in *Griswold, Roe* and *Stanley* cannot fairly be interpreted as collectively establishing an undifferentiated right to unfettered sexual expression (see Note, Constitutionality of Sodomy Statutes, 45 Fordham L Rev 553, 575). Consequently, the majority's effort to justify its holding today as a mere extension of these decisions is, in the final analysis, entirely unconvincing.

The "fundamental" rights recognized in *Griswold, Roe* and their progeny are clearly not a product of a belief on the part of the Supreme Court that modern values and changing standards of morality should be incorporated wholesale into the due process clause of the Fourteenth Amendment. To the contrary,

the language of the Supreme Court decisions makes clear that the rights which have so far been recognized as part of our due process guarantee are those rights to make certain familial decisions which have been considered sacrosanct and immune from governmental intrusion throughout the history of western civilization. The point has been aptly made by Justice HARLAN in his oft-quoted dissent in *Poe v Ullman* (367 US 497-553, quoted in *Griswold v Connecticut*, 381 US 479, *supra*, at p 499 [GOLDBERG, J., concurring]): "Adultery, homosexuality and the like are sexual intimacies which this State forbids * * * but the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected. It is one thing when the State exerts its power either to forbid extra-marital sexuality * * * or to say who may marry, but it is quite another when, having acknowledged a marriage and the intimacies inherent in it, it undertakes to regulate by means of the criminal law the details of that intimacy". Justice DOUGLAS also made clear the nature of the "right of privacy" that was being protected when he stated in *Griswold v Connecticut (supra*, at p 486): "We deal with a right of privacy older than the Bill of Rights — older than our political parties, older than our school system * * * It is an association that promotes a way of life".

This is not to suggest that the Federal Constitution protects only those sexually related decisions that are made within the context of the marital relationship. As the majority notes, such a conclusion was effectively foreclosed when the Supreme court stated in *Eisenstadt v Baird* (405 US 438, 453, *supra*): "It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an in-

dependent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual,* married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child" (emphasis in original).

Nevertheless, contrary to the position taken by the majority, I cannot agree that this language foreshadows a recognition by the Supreme Court of a generalized right to complete sexual freedom for all adults, whether married or single. Instead, as is suggested by the careful wording of the quoted paragraph, I would conclude that *Eisenstadt* stands only for the narrower proposition that the ancient and "fundamental" right of an individual to decide "whether to bear or beget a child" cannot be limited to married adults (accord Hindes, Morality Enforcement Through the Criminal Law and the Modern Doctrine of Substantive Due Process, 126 U of Pa L Rev 344, 361-362).[1] Under this view, *Eisen-*

[1]I find additional support for my interpretation of the *Eisenstadt* opinion in subsequent pronouncements by the Supreme Court. In *Paris Adult Theatre I v Slaton* (413 US 49, 68), for example, the court squarely rejected the argument that "conduct which directly involves 'consenting adults' only has, for that sole reason, a special claim to constitutional protection". In response to this contention, the court observed: "Our Constitution establishes a broad range of conditions on the exercise of power by the States, but for us to say that our Constitution incorporates the proposition that conduct involving consenting adults only is always beyond state regulation, is a step we are unable to take" (footnotes omitted).

Similarly, in *Roe v Wade* (410 US 113, 154), the Supreme Court refused to accept the contention that "the claim * * * that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions". The *Roe* court flatly stated that "[t]he Court has refused to recognize an unlimited right of this kind in the past".

stadt may be regarded as a simple extension of a long line of cases protecting "freedom of personal choice in matters of marriage *and family life*" *(Roe v Wade,* 410 US 113, 169, *supra* [STEWART, J., concurring; emphasis supplied]; see *Loving v Virginia,* 388 US 1 [personal decisions relating to marriage]; *Prince v Massachusetts,* 321 US 158 [decisions relating to family relationships]; *Skinner v Oklahoma,* 316 US 535 [decisions relating to procreation]; *Pierce v Society of Sisters,* 268 US 510; *Meyer v Nebraska,* 262 US 390 [decisions relating to childbearing and education]). Indeed, even the highly controversial decision in *Roe v Wade (supra)* holding the freedom of women to obtain abortions to be a constitutionally protected right may be regarded as part of the continuum of cases that bring within the ambit of the due process clause those familial decisions that historically have enjoyed immunity from governmental regulation. As the *Roe* court was careful to point out: "It perhaps is not generally appreciated that the restrictive criminal abortion laws in effect in a majority of States today are of relatively recent vintage. Those laws, generally proscribing abortion or its attempt at any time during pregnancy except when necessary to preserve the pregnant woman's life, are not of ancient or even of common-law origin. Instead, they derive from statutory changes effected, for the most part, in the latter half of the 19th century" (410 US 113, 129, *supra).*

The majority impliedly recognizes that the Supreme Court has to date limited the protection of the Constitution to decisions relating to the traditionally protected areas of family life, marital intimacy and procreation. Yet the majority has also concluded that there exists "no rational basis * * * for excluding from the same protection decisions * * * to seek sexual gratification from what at least once was commonly regarded as

'deviant' conduct" (p 488). I must disagree, however, because my reading of the recent Supreme Court cases leads me to the conclusion that the distinction repeatedly drawn in those cases between the freedom of choice in the historically insulated areas of procreation, family life and marital relationships on the one hand and the general freedom of unfettered sexual choice on the other is more than just a temporary or artificial one.[2]

The assertion that the theories espoused in *Griswold*, *Roe* and their progeny may be likened to the discredited doctrine of "substantive due process" (see, e.g., *Coppage v Kansas*, 236 US 1; *Lochner v New York*, 198 US 45; *Allgeyer v Louisiana*, 165 US 578; see, generally, Tribe, American Constitutional Law, §§ 8-1 through 8-7) would not come as a surprise to any serious con-

[2]While the majority has placed great reliance upon the decision of the Supreme Court in *Stanley v Georgia* (394 US 557) as support for the proposition that the Bill of Rights encompasses a general right of privacy and personal autonomy, that decision, in my view, is not susceptible of such an expansive reading (compare *Paris Adult Theatre I v Slaton*, 413 US 49). In *Stanley*, the court struck down a State statute that penalized the private possession of printed pornographic material in the home. Although the *Stanley* court acknowledged that the obscene materials themselves would not ordinarily be covered by the protection of the First Amendment (see *Roth v United States*, 354 US 476), it made clear that its decision to invalidate the challenged legislation was based in large measure upon the individual's First Amendment "right to receive information and ideas, regardless of their social worth" (394 US, at p 564). Indeed, in a significant passage of its opinion, the *Stanley* court stated: "If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch" (*id.*, at p 565). The so-called "privacy right" recognized in *Stanley* may thus be regarded as a simple extension of the First Amendment guarantee against governmental interference with the transmission of ideas. That the "privacy right" articulated in *Stanley* does not extend beyond the "right to receive information" and into the claimed right to receive "sensations", whether sexually or chemically induced, was reaffirmed in our recent decision in *People v Shepard* (50 NY2d 640, *supra*).

stitutional scholar. Many have made the observation that the modern notion of "fundamental rights" bears a striking resemblance to the *Lochner* doctrine under which State economic and social regulations were routinely struck down as violative of certain basic, substantive freedoms that were thought to inhere in the due process clauses of the Fifth and Fourteenth Amendments (see, e.g., *Roe v Wade*, 410 US 113, 167-171 [STEWART, J., concurring], 171-178 [REHNQUIST, J., dissenting], *supra; Griswold v Connecticut*, 381 US 479, 514-527 [BLACK, J., dissenting], *supra;* Tribe, American Constitutional Law, § 15-2; Craven, Personhood: The Right to Be Let Alone, 1976 Duke LJ 699, 712-713; Epstein, Substantive Due Process By Any Other Name: The Abortion Cases, 1973 S Ct Rev 159). The *Lochner* doctrine was ultimately rejected by the Supreme Court in part because it had placed the court in the position of a "super-legislature" enabling it to use the "vague contours" of the due process clause as a vehicle for striking down State legislation which it found to be inconsistent with its own contemporary views of natural law *(Ferguson v Skrupa*, 372 US 726; accord *Williamson v Lee Opt. Co.*, 348 US 483, 488; *Day-Brite Light. v Missouri*, 342 US 421, 423). Indeed, inherent in the *Lochner* doctrine was the very real danger that a countermajoritarian institution such as the court would impose upon the elected officials of State government its *ad hoc* notions regarding the substantive content of the term "liberty" and would place restrictions upon the States' power to govern over and above those mandated by the specific provisions contained in the body of the Constitution and the Bill of Rights. It was out of a recognition of this danger that the rule of judicial restraint and minimal judicial scrutiny of State legislation was born (see Tribe, American Constitutional Law, § 8-7).

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In the wake of *Griswold* and *Roe*, it is no longer an intellectually defensible position to suggest that the once discredited doctrine of "substantive due process" is entirely dead and buried. On the other hand, it is far from clear that those two cases heralded an unqualified return to the days when a Judge acted as "a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness" (Cardozo, Selected Writings, Nature of the Judicial Process, at p 164, quoted in *People v Shepard*, 50 NY2d 640, 646, *supra*). As the language of those decisions and their forerunners indicates, the "fundamental" rights so far recognized by the Supreme Court under the modern version of "substantive due process" have been strictly limited to those that may be traced to matters that were traditionally insulated from governmental intrusion. In my view, it is precisely this limitation that differentiates the relatively recent "fundamental right" concept from the long discarded and truly pernicious doctrine enunciated in *Lochner v New York (supra)*.

To suggest, as the majority does, that the concept of "fundamental rights" should be expanded to include a generalized right to sexual gratification in whatever form would be, in effect, to bring the law of "substantive due process" full circle by eliminating all of its present salutary limitations and restoring it to its former status as a vehicle for lawmaking by judicial fiat. The majority acknowledges in passing that the sexual choice the defendants now assert as a matter of constitutional right was once regarded as " 'deviant' conduct" (p 488), but it erroneously ascribes no legal significance to that fact, relegating it instead to an irrelevant phenomenon of theology and privately held moral beliefs. This rather glib refusal to take account of the historical treatment of consensual sodomy as criminally punishable conduct has left a gaping hole in the majority's analysis.

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In contrast to decisions relating to family life, matrimony and procreation, decisions involving pure sexual gratification have been subject to State intervention throughout the history of western civilization (see *Griswold v Connecticut*, 381 US 479, 505, *supra* [WHITE, J., concurring]; *Poe v Ullman*, 367 US 497, 553, *supra* [HARLAN, J., dissenting]; *Doe v Commonwealth's Attorney for City of Richmond*, 403 F Supp 1199, affd 425 US 901; *Dawson v Vance*, 329 F Supp 1320, 1322; *State v Bateman*, 25 Ariz App 1, 4, revd in part 113 Ariz 107 [en banc]). Scholars from Aquinas to Blackstone considered even consensual sodomy to be as heinous as the crime of rape (43 Aquinas, Summa Theologiae, pp 246-249 [Gilby ed]; 4 Blackstone's commentaries *215; see generally, Richards, Unnatural Acts and the Constitutional Right to Privacy: A Moral Theory, 45 Fordham L Rev 1281, 1292-1298). Indeed, as early as 1553 during the reign of Henry VIII, England enacted statutes prohibitng sodomy which became part of the American common law at the time of the American Revolution and were later embodied in the penal codes of the various States. Thus, although some may take offense at the persistence of the proscriptions against consensual sodomy in our modern law, the fact remains that western man has never been free to pursue his own choice of sexual gratification without fear of State interference. Consequently, it simply cannot be said that such freedom is an integral part of our concept of ordered liberty as embodied in the due process clauses of the Fifth and Fourteenth Amendments.

In view of the continuous and unbroken history of anti-sodomy laws in the United States, the majority's decision to strike down New York's statute prohibiting consensual sodomy can only be regarded as an act of judicial legislation creating a "fundamental right" where none has heretofore existed. As such,

today's decision represents a radical departure from cases such as *Griswold* and *Roe*, in which the Supreme court merely swept aside State laws which impaired or prohibited entirely the free exercise of rights that traditionally had been recognized in western thought as being beyond the reach of government. I cannot concur in the majority's conclusion.[3] As Justice BLACK once observed, "I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision *(Griswold v Connecticut*, 381 US 479, 510, *supra* [BLACK, J., dissenting]).[4]

---

[3]Without intending to sound a general alarm, I cannot help but wonder what the limits of the majority's new doctrine of "personal autonomy" might be. If, for example, the freedom of an individual to engage in acts of consensual sodomy is truly a "fundamental right", it would seem fairly clear that, absent a "compelling state interest", the State cannot impose a burden upon the free exercise of that right by limiting the individual's access to government jobs (cf. *Shapiro* v *Thompson*, 394 US 618). Moreover, if the only criterion for determining when particular conduct should be deemed to be constitutionally protected is whether the conduct affects society in a direct and tangible way, then it is difficult to perceive how a State may lawfully interfere with such consensual practices as euthanasia, marihuana smoking, prostitution and homosexual marriage. I very much regret that the majority has failed in its discussion of the "fundamental right" to personal autonomy to set forth some analytical framework for resolving difficult questions such as these.

[4]Inasmuch as I conclude that there is no "fundamental right" to sexual gratification, I must also consider whether section 130.38 of the Penal Law represents an irrational classification on the basis of marital status in violation of the equal protection clause of the Fourteenth Amendment. Since marital status has never been recognized as a "suspect classification" (compare Executive Law, § 296), the legislative distinction between marrieds and unmarrieds may stand if it bears some rational relation to a legitimate governmental interest.

Footnote continued on next page—

APPENDIX A
Order and Opinion of the New York Court of Appeals
Entered December 18, 1980

Accordingly, I cast my vote to reverse the order of the Appellate Division in People v Onofre and to affirm the respective orders of the County Court in People v Peoples, People v Goss and People v Sweat.

Judges WACHTLER, FUCHSBERG and MEYER concur with Judge JONES; Judge JASEN concurs in result in a separate opinion; Judge GABRIELLI dissents and votes to reverse in another opinion in which Chief Judge COOKE concurs.

In *People v Onofre:* Order affirmed.

Judges WACHTLER, FUCHSBERG and MEYER concur with Judge JONES; Judge JASEN concurs in result in a separate opinion; Judge GABRIELLI dissents and votes to affirm in another opinion in which Chief Judge COOKE concurs.

In *People v Peoples* and *Goss* and *People v Sweat:* Orders reversed, convictions vacated and informations dismissed.

—*Footnote continued from preceding page*

Unlike my colleagues in the majority, I have no trouble concluding that the legislative decision to permit married individuals to engage in conduct that is forbidden to the unmarried is rationally based. While the State may prefer that none of its citizens engage in the proscribed forms of sexual gratification, it may properly limit its statutory prohibition to those that are unmarried on the theory that the institution of marriage is so important to our society that even offensive intimacies between married individuals should be tolerated. The statute at issue in this case is thus distinguishable from the statute at issue in *Eisenstadt v Baird* (405 US 438), where the Supreme Court concluded that a ban on the sale of contraceptives to unmarrieds only had no relation to any legitimate government interest.

APPENDIX B
Order of the New York Court of Appeals
Entered February 10, 1981

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the tenth *day of* February *A.D. 1981*

PRESENT, Hon. Lawrence H. Cooke, *Chief Judge, presiding.*

---

4 Mo. No. 81
The People &c.,

Respondent,

vs.

Conde J. Peoples, III and
Philip S. Goss,

Appellants.

The People &c.,

Respondent,

vs.

Mary Sweat,

Appellant.

A motion for reargument &c. in the above cause having heretofore been made upon the part of the appellants herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

/s/ JOSEPH W. BELLACOSA
Joseph W. Bellacosa
Clerk of the Court

APPENDIX C
Order and Memorandum of Erie County Court
Entered October 9, 1979

ORDER

TRANSFERRED
TO City Court of Buffalo
ON 10/18/79
Complete

At a Term of the County Court, held in and for the County of Erie, in the County Hall, City of Buffalo, New York, on the 9th day of October, 1979.

PRESENT: HON. PENNY M. WOLFGANG, *Erie County Judge*

STATE OF NEW YORK
COUNTY COURT: COUNTY OF ERIE

THE PEOPLE OF THE STATE OF NEW YORK

Respondent

vs.

CONDE J. PEOPLES, III
and PHILIP S. GOSS,

Defendants-Appellants

D. A. No. 79-169
Buffalo City Court
Docket No. 3C-9927, E-65305
and
D. A. No. 79-170
Buffalo City Court
Docket No. 3C-9928, E-65305

APPENDIX C

Order and Memorandum Opinion of Erie County Court
Entered October 9, 1979

The above-named, CONDE J. PEOPLES, III, and PHILIP S. GOSS, defendants-appellants in the above-entitled matter, having appealed to this Court from a judgment of the City Court of Buffalo entered on April 16, 1979; and said appeal having been argued by WILLIAM H. GARDNER, of counsel for defendants-appellants, ERNEST G. ANSTEY, of counsel for respondent, and due deliberation having been had thereon,

It is hereby ORDERED, that the judgment so appealed from be, and the same is hereby affirmed.

/s/ PENNY M. WOLFGANG
Erie County Judge

GRANTED this 9th day October, 1979.

/s/ MARGARET R. MARTINI
Special Deputy Clerk

APPENDIX C

Order and Memorandum Opinion of Erie County Court
Entered October 9, 1979

ORDER

TRANSFERRED
TO City Court of Buffalo
ON 10/18/79
Complete

At a Term of the County Court, held in and for the County of Erie, in the County Hall, City of Buffalo, New York, on the 9th day of October, 1979.

PRESENT: HON. PENNY M. WOLFGANG, *Erie County Judge*

STATE OF NEW YORK
COUNTY COURT: COUNTY OF ERIE

THE PEOPLE OF THE STATE OF NEW YORK

Respondent

vs.

MARY SWEAT,

Defendant-Appellant

D. A. No. 79-200
Buffalo City Court
Docket No. 3C-12614
Index No. E-66900

The above-named, MARY SWEAT, defendant-appellant in the above-entitled matter, having appealed to this Court from a judgment of the City Court of Buffalo entered on April 30, 1979; and said appeal having been argued by WILLIAM H. GARD-

APPENDIX C

Order and Memorandum Opinion of Erie County Court
Entered October 9, 1979

NER, of counsel for defendant-appellant, ERNEST G. ANSTEY, of counsel for respondent, and due deliberation having been had thereon,

It is hereby ORDERED, that the judgment so appealed from be, and the same is hereby affirmed.

/s/ PENNY M. WOLFGANG
Erie County Judge

GRANTED this 9th day October, 1979.

/s/ MARGARET R. MARTINI
Special Deputy Clerk

APPENDIX C

Order and Memorandum Opinion of Erie County Court
Entered October 9, 1979

STATE OF NEW YORK
COUNTY COURT — County of Erie

THE PEOPLE OF THE STATE OF NEW YORK

Respondent

vs.

CONDE J. PEOPLES, III and
PHILIP S. GOSS

Defendant-Appellants

THE PEOPLE OF THE STATE OF NEW YORK

Respondent

vs.

MARY SWEAT

Defendant-Appellant

EDWARD C. COSGROVE
District Attorney of Erie County
By: ERNEST G. ANSTEY, ESQ.
Assistant District Attorney
Appearing for the Respondent.

HODGSON, RUSS, ANDREWS
WOODS & GOODYEAR, ESQS.
By: WILLIAM H. GARDNER, ESQ., *Of Counsel*
1800 One M & T Plaza
Buffalo, New York 14203
Attorney for Appellants.

APPENDIX C

Order and Memorandum Opinion of Erie County Court
Entered October 9, 1979

MEMORANDUM

WOLFGANG, J.

Appellants Peoples and Goss are appealing from a judgment of conviction entered in the City of Buffalo on April 16, 1979. After a trial by jury both were found guilty of Consensual Sodomy in violation of Penal Law Section 130.38.

Appellant Sweat is appealing from a judgment of conviction entered in the City Court of Buffalonon (sic) April 30, 1979. After a non-jury trial, Appellant Sweat was found guilty of the same crime of Consensual Sodomy.

These cases present the same issues and are therefore being combined for purposes of this memorandum decision.

It is the claim of the Appellants that the Penal Law Section covering Consensual Sodomy is unconstitutional as it denies equal protection of the law by distinguishing between married and unmarried citizens. Appellants also attack the constitutionality of the law covering Consensual Sodomy claiming that the said law is unconstitutional as a violation of their right to privacy.

As concerns the claim of unequal protection, the validity of the distinction between married and unmarried persons in proscribing the act of Consensual Sodomy has previously been ruled upon in the Erie County Court in *People v. Johnson* (LaMendola, J.C.C., Decision 4/14/75) and in the United States District Court, S.D. New York, in *Raphael v. Hogan*, 395 Fed. Supp. 749.

In *Raphael* at page 755 the Court stated as follows:

> "The authority of the State to enact laws to promote the health, safety, morals and general welfare of its people "cannot be doubted. See *Near v. Minnesota*, 283 U.S. 697."

APPENDIX C

Order and Memorandum Opinion of Erie County Court Entered October 9, 1979

The Court in *Raphael*, at page 756, went on to state:

> "We believe a rational foundation exists for the state's discrimination between acts of Consensual Sodomy committed by married and unmarried persons."

In the instant matter, this Court must follow the findings of both the United States District Court and the previous Erie County Court decision referred to above. Other statutes exist under which married persons committing similar acts may be prosecuted.

Appellants further claim that the Penal Law Section covering Consensual Sodomy is unconstitutional in that it violates their rights to privacy.

The constitutionally protected right to privacy has been an established and accepted right since *Griswold v. Connecticut* (331 U.S. 479). *Griswold* concerned itself with a specific right to privacy, that being the right to disseminate birth control information to married persons. Justice Goldberg's concurring opinion in *Griswold* clearly limited the effect of the Courts decision by stating:

> "Finally, it should be said of the Courts holding today that it in no way interferes with a State's proper regulation of sexual promiscuity or misconduct. As my Brother Harlan so well stated in his dissenting opinion in *Poe v. Ullman* supra, 367 U.S. at 553 . . .
>
> 'Adultery, homosexuality and the like are sexual intimacies which the State forbids . . . but the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected.'
>
> In sum, I believe that the right of privacy in the *marital relation* is fundamental and basic — a personal right

APPENDIX C

Order and Memorandum Opinion of Erie County Court
Entered October 9, 1979

> "retained by the People" within the meaning of the Ninth Amendment. (emphasis added). — 381 U.S. at 498-499.

Other Supreme Court decisions concerning privacy came after *Griswold. Stanley v. Georgia,* 394 U.S. 557; *Eisenstadt v. Baird,* 405 U.S. 438; *Roe v. Wade,* 410 U.S. 113. Each decision expanded the areas of personal privacy in which the State had no legitimate interest. Yet each decision, although expanding the constitutionally protected right to privacy, continued to exempt from such right to privacy, those matters wherein the State had a legitimate interest. As the Court stated in *Roe v. Wade,* supra:

> "The privacy right involved, therefore, cannot be said to be absolute. In fact, it is not clear to us that the claim asserted by some *amici,* that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions. The Court has refused to recognize an unlimited right of this kind in the past." (410 U.S. at p. 154).

Appellants now contend that, based upon the decisional background referred to above, the constitutionally protected right to privacy should be extended to include acts of Consensual Sodomy committed between unmarried adults in cars parked at the side of public roads, thus declaring unconstitutional New York State Penal Law Section 130.38.

As noted by Respondent, the very question raised by Appellants was presented in *Doe v. Commonwealth's Attorney for City of Richmond,* 483 F. Supp. 1189. (E. D. Va. 1975), aff'd 425 U.S. 901 (1976) wherein a Three-Judge District Court found a Virginia sodomy statute to be constitutional. When this decision was summarily affirmed by the United States Supreme Court, it became the "law of the land" and binding on lower courts. This

APPENDIX C
Order and Memorandum Opinion of Erie County Court
Entered October 9, 1979

Court cannot and will not speculate as to the reason why a summary affirmance was granted.

As the Court stated in Doe, id. 403 F. Supp., at 120,

> 'No judgment is made upon the wisdom or policy of the statute. It is simply that we cannot say that the statute offends the Bill of Rights or any other of the Amendments and the wisdom or policy is a matter for the State's resolve.... If the State determines that punishment, therefore, ... is appropriate in the promotion of morality and decency, it is not for the Courts to say that the State is not free to do so.

The mores of our society are rapidly changing as concerns personal sexual activity between consenting adults. Certain acts of sexual conduct which were once proscribed are now accepted and protected by the ever expanding right to privacy. The discretion however, as to which particular acts are to be so sanctioned and which are not, remains with the legislature.

So long as the legislature maintains the power and authority to regulate certain acts of sexual conduct in order to promote the "health, safety, morals and general welfare" of the citizens of our State, and so long as the higher courts continue to determine that the State has a legitimate interest in exempting certain sexual acts from the constitutionally protected right to privacy, this Court will continue to enforce the legislature's right to do so.

Appellant's also claim that the Court below erred in failing to find that there was discriminatory enforcement of the statute, thereby denying defendants the equal protection of the laws.

The Court finds no merit in this argument. The evidence presented in the court below relating to the crime of adultery is irrelevant to the consideration of a claim of selective and discriminatory enforcement made by persons charged with the

APPENDIX C
Order and Memorandum Opinion of Erie County Court
Entered October 9, 1979

crime of Consensual Sodomy. No evidence was produced by Appellants showing a consciously practiced pattern of discrimination or selectivity in the enforcement of the Penal Law Section covering Consensual Sodomy (see *People v. Goodman*, 31 N.Y.2d 262).

For the reasons stated above, the judgments of conviction are affirmed in all respects.

Submit Orders accordingly.

PENNY M. WOLFGANG
J.C.C.

DATED: Buffalo, New York,
September 24, 1979.

GRANTED: SEP 25, 1979
MARGARET R. MARTINI
Court Clerk

APPENDIX D
Relevant Provisions of the United States Constitution

AMENDMENT XIV, SECTION 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX E
New York State Penal Law Section 130.38

§130.38 CONSENSUAL SODOMY

A person is guilty of consensual sodomy when he engages in deviate sexual intercourse with another person.

Consensual sodomy is a class B misdemeanor.

FILED
APR 20 198
ALEXANDER L. ST
CLERK

No. 80-1710

IN THE

Supreme Court of the United States

October Term, 1980

THE PEOPLE OF THE STATE OF NEW YORK,
Petitioner,

vs.

CONDE J. PEOPLES, III, PHILIP S. GOSS,
and MARY SWEAT,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

October Term, 1980

No. 80-1710

THE PEOPLE OF THE STATE OF NEW YORK,
Petitioner,

vs.

CONDE J. PEOPLES, III, PHILIP S. GOSS,
and MARY SWEAT,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Introductory Statement

Respondents respectfully urge that the issues involved in this litigation do not warrant the grant of the writ in this instance. The decision of the New York Court of Appeals was eminently correct. Moreover, even if a future decision by this Court should determine that the Court of Appeals has ruled erroneously in this instance, the issue is not ripe for determination by the Supreme Court at the present time. Finally, the decision below poses no hardship for the People of the State of New York, inasmuch as New York has a readily available alternative—enactment of acceptable and clearly constitutional legislation—to protect the only areas which the state policy is really concerned about with respect to sodomous activity between consenting adults.

The Procedural Posture

As noted by the petitioner (Petition for Writ, 4), the Court of Appeals considered the appeals of these respondents together with the appeal of Onondaga County District Attorney from the decision of the State's intermediate appellate court declaring the consensual sodomy statute (Penal Law §130.38) unconstitutional. *People vs. Onofre*, 72 A.D.2d 268, 424 N.Y.S.2d 566 (4th Dep't 1980), *aff'd* 51 N.Y.2d 476 (1980)[1]. A petition for certiorari has been filed by the Onondaga County District Attorney in the *Onofre* case (Docket No. 80-1634). The two petitions should be consolidated and ruled upon jointly. Both cases involve the same issues, *Onofre* presenting the issue in the factual context of privately practiced sex and the remaining cases presenting the issue in the factual context of sex performed in motor vehicles by two couples, one homosexual and the other heterosexual.

ARGUMENT

POINT I.

The respondents had standing to raise the privacy issue.

The New York consensual sodomy law[2] is almost never enforced in situations where the act occurs in a private

---

[1] The Court of Appeals decision was consolidated for all cases and is cited herein under its published title, "*People vs. Onofre*".

[2] The consensual sodomy statute is reproduced at Petition, Appendix E (A-52). The definition of "deviate sexual intercourse" is found in New York Penal Law §130.00 and is "sexual conduct between persons not married to each other consisting of contact between the penis and the anus, the mouth and penis, or the mouth and the vulva." It thus includes both homosexual and heterosexual acts, performed with increasing frequency in modern times.

place. On a pre-trial hearing held in the *Peoples* and *Goss* case, the chief of the Buffalo Police Vice Squad acknowledged that the police do not attempt to enforce the statute where the acts occur in private (R. 66, 77-78, 109, 113)[3]. This is in contrast to situations, like *Onofre*, where the original charge was that the private sodomous act was forced, not consensual[4]. Thus, the issue never comes to the courts in a pure privacy fact context, apart from the extremely rare case typified by *People vs. Onofre*.

Thus, respondents Peoples, Goss and Sweat occupy the same position as the defendants in *Griswold vs. Connecticut*, 381 U. S. 479 (1965), where the purveyors of the proscribed birth-control devices were allowed to assert the constitutional rights of privacy of the recipients thereof. See, also, *Orr vs. Orr*, 440 U. S. 268 (1979), where the husband was allowed to raise the issue of sex discrimination in the state matrimonial statute, even though the outcome of his case would not have been changed by elimination of the discriminatory provision.

The New York Court of Appeals noted that the issue is moot, anyway, since the disposition in favor of respondents' claim on the basis of impermissible discrimination between married people and single people would be as applicable to the public act as well as to the private act. See *People vs. Onofre, supra*, 51 N.Y.2d 476 at 485, note 2 [Petition, A-14]; *Commonwealth vs. Bonadio*, _____ Pa. _____, 415 A.2d 47 (1980).

---

[3] The Legislature, in enacting New York's consensual sodomy statute apparently did not anticipate vigorous enforcement. See Point IV, *infra*.

[4] The original charge against Ronald Onofre was that he forcibly committed sodomy on the complaining witness. An alternative charge of consensual sodomy was included in the indictment. After indictment, the complaining witness recanted, admitting that the act was solely consensual and the matter, having already been indicted, went to judgment. Petition, *New York vs. Onofre*, Docket No. 80-1634, page 5.

POINT II.

The Court of Appeals has correctly determined that the right of privacy extends to private acts of consensual sodomy.

There is nothing in the majority decision in *Griswold vs. Connecticut* to suggest that the right of privacy is limited to the matrimonial state. In fact, the predicate cases used by this Court in inferring the right of privacy involved non-marital situations (education of children, association with organizations, *etc.; Griswold vs. Connecticut, supra*, 381 U. S. at 482-484). *Stanley vs. Georgia*, 394 U. S. 557 (1969), made clear the fact that the privacy right was not so limited. While emphasizing the fact patterns there present (the reading and viewing of printed information), the obscenity of the material there involved deprived it of First Amendment protection. The case is not properly understood as merely a vindication of First Amendment rights. As the Court articulated its reasoning, it becomes clear that a more expansive interest was being protected, the right of occupants of a private dwelling to engage in conduct not objectively harmful to themselves or others without the interference of the State.

> "[A]lso fundamental is the right to be free, except in very limited circumstances, from unwarranted governmental intrusion into one's privacy.
>
> " 'The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of a man's spirtual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as

> against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man.' *Olmstead vs. United States,* 277 U. S. 438, 478 (1928) (Brandeis, J., dissenting).
>
> "See *Griswold vs. Connecticut, supra* . . . .
>
> ". . . Stanley is asserting the right to read or observe what he pleases—the right to satisfy his intellectual and emotional needs in the privacy of his home. . . . Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home."

Eisenstadt vs. Baird, 405 U. S. 438 (1972), extended the right of privacy beyond the husband-wife relationship to protect the right of the unmarried person to have access to contraceptives. *Roe vs. Wade,* 410 U. S. 113 (1973), recognized the right of an unmarried pregnant woman to have an abortion. See, also, *Doe vs. Bolton,* 410 U. S. 179 (1973), where Mr. Justice Douglas speaks of the right as protecting "freedom of choice in basic decisions of one's life" (*id.* at 211), *Whalen vs. Roe,* 429 U. S. 589 (1977), where it is described as "the interest in independence in making certain kinds of important decisions" (*id.* at 599-600) and *Carey vs. Population Services,* 431 U. S. 678 (1976), where, in the context of an issue involving the state's right to limit distribution of contraceptives, the Court speaks of it as "a field that by definition concerns the most intimate of human activities and relationships, [where] decisions whether to accomplish or prevent contraception are among the most private and sensitive" *Id.* at 685.

It is with this background of a gradually developing concept of the right to privacy that the New York courts

have recognized private, consensual, non-commercial and non-harmful sodomous activity as being constitutionally protected.

> "Thus, it is seen that the concept of personal freedom includes a broad and unclassified group of values and activities related generally to individual repose, sanctuary and autonomy and the individual's right to develop his personal existence in the manner he or she sees fit. Personal sexual conduct is a fundamental right, protected by the right to privacy because of the transcendental importance of sex to the human condition, the intimacy of the conduct, and its relationship to a person's right to control his or her own body. . . . The right is broad enough to include sexual acts between nonmarried persons . . . and intimate consensual homosexual conduct. . . . *People vs. Onofre, supra*, 72 A.D.2d at 270-271 (4th Dep't 1980).

This conclusion by the lower court has been joined in by the New York Court of Appeals in the context of a finding that there is "no showing of any threat, either to participants or the public in general, in consequence of the voluntary engagement by adults in private, discreet, sodomous conduct." *People vs. Onofre, supra*, 51 N.Y.2d at 490. [Petition, A-21].

The conclusions reached by the New York Court of Appeals are consistent with the prior holdings of this Court which have, in effect, recognized the human right to enjoy private erotic pleasures associated with the sexual function, within or without the marital context, without being required to suffer the consequences of pregnancy, on the one hand (*Griswold vs. Connecticut, supra; Eisenstadt vs. Baird, supra; Roe vs. Wade, supra*), or the interference of the State in dictating the moral tastes of the citizen, on the other. (*Stanley vs. Georgia, supra*).

This Court's summary affirmance of the District Court's ruling in *Doe vs. Commonwealth's Attorney for City of Richmond*, 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd* 425 U. S. 901 (1976), can be readily understood as a rejection of the standing of the plaintiffs who raised the issue of the Virginia statute's constitutionality in a declaratory judgment action. In any event, the summary affirmance is not evidence of this Court's determination on the merits of the issue. *Fusari vs. Steinberg*, 419 U. S. 379, particularly at 391-392, Burger, C.J. concurring (1975).

POINT III.

Whether or not the conclusion below was correct, the matter should not be reviewed by this Court at this time.

Twenty-four States have now decriminalized consensual sodomy between adults in private.[5] Most of this activity toward decriminalization has occurred through legislation. See Rivera, "Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States", 30 Hastings L. J. 799, 950-951 (1979). Where the issue has been presented to state courts for decision on constitutional grounds, only nine States' courts have ruled on the issue.[6] Twenty-seven state jurisdictions

[5] This includes the twenty-two states referred to in Note 5 to the decision below. *People vs Onofre, supra*, 51 N.Y.2d at 491 [Petition, A-22]. In addition, subsequent to the cited article's publication, Pennsylvania invalidated its statute by judicial action (*Commonwealth vs. Bonadio, supra*, decided in 1980), and New York's statute was struck down in the case at bar.

[6] See listing of state decisions in Petition, *New York vs. Onofre*, Docket No. 80-1634, pages 5-6. Pennsylvania, New Jersey, Iowa, Maryland, North Carolina, Oklahoma, Arizona, New Mexico and (with the instant decision) New York have now ruled on the issue. In some instances, however, the state ruling was not by its highest appellate court.

(including the District of Columbia) continue to have consensual sodomy statutes in effect. We can anticipate that, with time, further consideration of the issue will be had among the state courts, and issues which now may not be fully understood or ready for definitive ruling on a national level, with the benefit of the full maturity of extensive consideration by the lower courts, will become ripe for decision by this Court. Whatever the concern of some who would exercise the power to control private morality, if they could, no serious impediment will be placed against any important public policy concerns if this issue is allowed to undergo further review in the state courts and legislatures before a final determination on the issue is made by this Court.

POINT IV.

The public policy concerns of New York State will not be impeded by the denial of certiorari.

The consensual sodomy statute was included in the 1965 recodification of the New York Penal Law simply as a legislative statement of abhorrence of the subject conduct, not with any intention that it be enforced in the private context. The Penal Law Revision Commission had recommended omission of the offense from the new statute. However, the Legislature refused to pass the bill encompassing the entire Penal Law, except in the company of two amending bills reinserting the crimes of consensual sodomy and adultery in the New York Penal Law. See Memorandum of Assemblyman Richard J. Bartlett, Chairman of the Penal Law Revision Commission included in the legislative history. New York State Legislative Annual, 51-52 (1965).[7]

[7] The Memorandum is reproduced at pages 137-138 of the Record to the New York Court of Appeals.

> "The Commission's reasons for omitting this phase of the crime of sodomy [consensual sodomy] were similar to its reasons for omitting adultery. It was of the opinion that this infrequently prosecuted offense involves a manifestation of illness rather than of criminal culpability and should be regarded as an illness rather than as a crime. . . . It would appear that the Legislature's decision to restore the consensual sodomy offense was, as with adultery, based largely upon the premise that deletion thereof might ostensibly be construed as legislative approval of deviate conduct." (*Ibid.* at 52; R-138)

As noted above (Part I of this Brief), the consensual sodomy statute is not enforced in private situations in all but extremely rare instances, like *New York vs. Onofre* (Docket No. 80-1634), which might be expected to occur once or twice in a generation. The real concern of the New York authorities (apart from retaining some moral "standard" in the penal statutes to encourage some privately held concept of morality) is to control *public* conduct. This is already covered by the Penal Law's proscription of public lewdness (New York Penal Law §245.00). If that statute is not sufficiently specific to cover all situations occurring in public, there can be no doubt of the authority of the New York Legislature to pass a statute prohibiting sexual conduct of whatever nature in a place or under circumstances where members of the public may observe the conduct and be offended thereby.

Such legislation would be non-discriminatory (making no exception for husbands and wives) and would apply to all persons and forms of sexual conduct—whether sodomous or otherwise. Thereby, the interest of protecting members of the public from offense would be fully vindicated.

Denial of the present petition, in other words, leaves the State of New York fully free to protect the interests of its citizens from public sex, where offense and harm can be readily inferred. It would merely withhold from New York a statute which, by its terms, is needlessly overbroad and offensive to privacy—covering conduct which the State has no general interest in regulating in any event.

Conclusion

The petition for certiorari should be denied.

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